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REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER ON THE WORK OF ITS ELEVENTH SESSION (New York, 5-16 February 1990)

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INTRODUCTION

1. At its nineteenth session in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 1/ The Working Group commenced its work on this topic at its tenth session, held at Vienna from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat. 2/ The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session. 3/

2. The Commission, at its twenty-second session in 1989, expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously. 4/

3. The Working Group, which was composed of all States members of the Commission, held its eleventh session in New York from 5 to 16 February 1990. The session was attended by representatives of the following States members of the Working Group: Argentina, Bulgaria, Cameroon, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, Hungary, India, Iraq, Iran (Islamic Republic of), Japan, Kenya, Lesotho, Mexico, Morocco, Netherlands, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia.

4. The session was attended by observers from the following States: Afghanistan, Angola, Burkina Faso, Colombia, Ecuador, El Salvador, German Democratic Republic, Holy See, Jordan, Liberia, Libyan Arab Jamahiriya, Oman, Paraguay, Philippines, Republic of Korea, Switzerland, Turkey, Uganda, United Republic of Tanzania, Vanuatu.

5. The session was also attended by observers from the following international organizations:

(a) United Nations organizations: International Bank for Reconstruction and Development, United Nations Development Programme;

(b) Intergovernmental organizations: Asian-African Legal Consultative Committee, Commission of the European Communities, Inter-American Development Bank;

(c) International non-governmental organizations: International Chamber of Commerce.

1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

2/ A/CN.9/WG.V/WP.22.

3/ A/CN.9/315, para. 125.

4/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 232 and 235.

6. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Mr. Jan de Boer (Netherlands)

7. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.23);

(b) Procurement: draft model law on procurement (A/CN.9/WG.V/WP.24);

(c) Procurement: commentary on draft model law on procurement (A/CN.9/WG.V/WP.25).

8. The Working Group adopted the following agenda:

(a) Election of officers.

(b) Adoption of the agenda.

(c) Procurement.

(d) Other business.

(e) Adoption of the report.

DELIBERATIONS AND DECISIONS

I. GENERAL DISCUSSION

9. The observer for the Commission of the European Communities informed the Working Group of developments within the European Communities (EC) directed towards the opening up of public procurement within the EC, which was one of the major elements in the creation of the single internal market within the EC. The EC had recently adopted new directives on the procurement of works and on the procurement of supplies, as well as a directive dealing with remedies. In addition, a directive on the procurement of services was under preparation. Work was also in progress on a proposal to include within the scope of the EC procurement directives entities that had hitherto been excluded.

10. The observer for the Asian-African Legal Consultative Committee proposed that the model law on procurement provide for the resolution of disputes arising from procurement through conciliation and arbitration. The provision should be flexible so as to enable implementing States to determine which types of disputes could be submitted for resolution by those means. Further, the model law should provide for the use of the UNCITRAL Arbitration Rules or the UNCITRAL Conciliation Rules where the parties to the arbitration or conciliation proceedings did not agree to use some other rules.

11. During the general discussion, it was noted that, as currently drafted, the model law did not deal with certain issues that were addressed in the General Agreement on Tariffs and Trade (GATT) Agreement on Government

Procurement, such as most-favoured-nation treatment, national treatment and special treatment for developing countries. It was suggested that the model law on procurement cover those issues in order to be consistent with the GATT Agreement on Government Procurement and in order to provide uniform rules as to those issues. In response, it was observed that the nature and scope of the model law, which was a model for national legislation, differed from that of the GATT Agreement on Government Procurement, which was a multilateral agreement, and that the model law sought to take account of the needs and interests of developing countries in various ways that were appropriate for its particular nature and scope.

12. A view was expressed that the model law as currently drafted was too complex, which made it difficult to understand and to use. Various proposals for dealing with that problem were made in the context of the discussion on particular articles. Another view was expressed that it would be preferable for the provisions of the model law to be constituted in the form of rules for voluntary use by a procuring entity or in the form of guidelines. That view did not receive support.

13. The Working Group endorsed the decision taken at its tenth session that the model procurement law should be accompanied by a commentary. Various views were expressed concerning the nature and status of the commentary and its relationship to the model law. It was generally agreed that, although both instruments would be adopted by the Commission, they would not have the same juridical status. The model law would set forth normative legal rules governing procurement and would be capable of existing independently of the commentary. The commentary would not have a normative legal character; rather it would serve to complement and facilitate the use of the model law.

14. It was noted that, as currently drafted, the commentary performed that role in various ways. Some portions of the commentary provided guidance for the interpretation of provisions of the model law; other portions provided guidance to States in enacting the model law and in promulgating supplementary procurement regulations; yet other portions provided guidance to procuring entities and to contractors and suppliers in using the model law. Significant support was expressed for that multifarious approach, since it made the commentary useful to the various categories of persons and entities involved in procurement and promoted the uniform interpretation and application of the model law.

15. Various other views were expressed, however, concerning the functions and structure of the commentary. According to one such view it was inappropriate for the commentary to interpret provisions of the model law. Another view was that it would be more appropriate for the guidance offered by the commentary to States in enacting the model law and in promulgating supplementary regulations to be contained in the text of the model law itself. It was also observed that some portions of the commentary might be designed to have lasting significance and applicability after the model law had been enacted (e.g., those portions providing guidance to the interpretation of the model law), while others might be regarded to have served their purpose completely once the model law had been enacted (e.g., those portions offering guidance to States in enacting the model law).

16. The Working Group decided that it would not at the current stage take final decisions as to the functions or structure of the commentary. However,

it would pay attention to the contents of the commentary during its examination of the articles of the model law. It would, in particular, seek to ensure that the commentary was consistent with the provisions of the model law and to eliminate from the commentary alternative approaches to the settlement of issues in the model law when a particular approach had been decided upon.

II. DISCUSSION OF ARTICLES OF DRAFT MODEL LAW ON PROCUREMENT

Article 1
Application of law

17. A suggestion was made that the reference to "such means as purchase, rental or otherwise" be re-examined to ensure that it adequately covered the various means by which goods were procured.

18. With respect to the second sentence in article 1, according to which the model law applied even if services were involved in the procurement as long as goods or construction constituted a "substantial part" of the procurement, a preference was expressed for the formulation used in the GATT Agreement on Government Procurement. That formulation covered "incidental services" where the value of those services did not exceed the value of the goods or construction. In support of that view, it was noted that, under the formulation currently used in the model law, an implementing State could restrict the scope of application of the model law by defining "substantial part" narrowly. A related proposal was made during the discussion of the definition of "construction" under article 2 (see paragraph 24, below).

19. According to a further proposal, the scope of the model law should be expanded to cover the procurement of consulting services and other types of services, since it was important for States to have an adequate legal framework for the procurement of those services. In opposition to the proposal, it was noted that the treatment of services was currently under discussion within GATT and any decision to enlarge the scope of the model law to cover services, other than those that were incidental to goods or construction being procured, should await the outcome of those discussions.

20. After some deliberation it was generally agreed that the Working Group would, at the current stage, prepare rules covering the procurement of goods and of construction, dealing also with services that were incidental or related to the procurement of goods or construction. The Working Group noted that the question of whether the model law should cover consulting services and other types of services could be addressed at a later stage.

Article 2
Definitions

21. A proposal was made that the definitions be deleted from the model law on the grounds that a large number of definitions would make the text difficult to read and that definitions were not necessary because the terms covered by the definitions could be described in the commentary. That proposal did not receive sufficient support.

22. A suggestion was made that article 2 be relocated to appear as article 1.

23. Various proposals were made with respect to the content of the definitions set forth in article 2. Concerning the definition of "procuring entity", a view was expressed that, when a State enacted the model law, it should indicate clearly not only those entities that were covered by the model law but also those that were not covered. According to another view, the definition of "goods" should be made more flexible so as to accommodate the procurement of items such as water, gas and electricity. It was further suggested that the international element in the term "international tendering proceedings" be more clearly defined. In that connection, the approach adopted in the UNCITRAL Model Law on International Commercial Arbitration (article 1(3)) was suggested as a model.

24. A suggestion was made that the definition of "construction" be broadened to cover activities analogous to construction, for which precise specifications could be prepared and which could be procured essentially on the basis of the price of the activities. They included, for example, drilling for water and gas, mapping, satellite photography and seismic studies procured in conjunction with construction projects. It was also suggested that the definition of construction include demolition.

25. It was proposed that the definition of "tender security" include a reference to surety bonds. It was also suggested that the definition refer to issuers of tender securities by using a term broader than "banks", such as "financial institutions". A further suggestion was that the definition point out that the purpose of a tender security was to secure the obligation of the tenderer to sign a contract in the event his tender was accepted.

26. It was suggested that the definition of "competitive negotiation proceedings" state explicitly that the term referred to a procedure involving negotiations on a competitive basis between a procuring entity and at least two bidders.

27. Suggestions were made that the model law provide definitions for a number of additional terms used in the model law, such as "procurement", "procurement proceedings", "responsive tender", "procurement regulations" and "tendering proceedings".

28. It was further suggested that the term "bid solicitation documents" be substituted for the term "procurement documents" that was used in various provisions of the model law, in order to distinguish clearly between the documents contained in a solicitation of tenders by a procuring entity and the documents submitted by a contractor or supplier as part of its tender.

29. The Working Group noted the various suggestions that had been made and requested the Secretariat to consider whether and how to implement them in the preparation of the next draft of the model procurement law.

Article 3
Underlying policies

30. Proposals were made that paragraph (1) be relocated to the beginning of the model law, either as a preamble or as the first article. With respect to the wording of that paragraph, a suggestion was made that the term "policies" be replaced with "purposes" or "objectives", in order to conform to usage in legislation.

READEX

31. It was proposed that the reference to maximizing efficiency in procurement (para. (1)(a)) be relocated from its current position to the end of the paragraph, and that the reference be reworded so as to provide that all of the objectives currently set out in paragraph (1)(b) through (f) be "consistent with the efficient operation of the procurement system". A related view was that the reference in paragraph (1)(a) to maximizing economy in procurement might be superfluous in view of the policy mentioned in paragraph (1)(c) of promoting competition among contractors and suppliers.

32. A proposal was made that subparagraph (2) be deleted on the ground that the model law should not address questions of hierarchy of law. In response to that proposal, it was stated that a provision in the model law clearly establishing the relationship of the model law to international obligations of the enacting State, including State practice under multilateral and bilateral treaties and including agreements with international financing institutions, would be of considerable practical value; it would enable procuring entities, faced with a conflict between the model law and an international obligation, to determine which to apply. It was also pointed out that such a provision could be useful from the standpoint of unification of law, because not all legal systems recognized the supremacy of international obligations over national legislation.

33. There was widespread support for retaining a provision along the lines of paragraph (2), subject, however, to improving the drafting so as to clarify that, if there was a conflict between a provision in the model law and the requirements of an international obligation, the requirements of the international obligation were to be applied; but in all other respects, the procurement was to be governed by the model law.

Article 4
Procurement regulations

34. A view was expressed that article 4 should be expanded so as to call upon the implementing State to identify in the article not only the organ authorized to promulgate procurement regulations, but also organs authorized to promulgate administrative rulings, directives or guidelines under the model law. That would help contractors and suppliers to become aware of legal requirements to which they might be subject. An opposing view was that the suggested expansion of the article would go too far. It was noted that, in some States, several organs might be empowered to issue various types of directives, rulings and guidelines relating to procurement. According to another view, it would be sufficient to alert contractors and suppliers to the possible existence of administrative directives, rulings and guidelines by defining "procurement regulations" as including such texts. After discussion, it was agreed that article 4 be retained in its current form, but that mention be made in the commentary that, in addition to the model law, various types of directives, rulings and guidelines might be applicable in particular procurement proceedings.

Article 5
Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

35. Views were expressed in support of the recommendation contained in

paragraph 2 of the commentary to this article that implementing States collect and issue in a single publication the laws, regulations and other legal texts relating to procurement in those States. Contrary views were expressed that such a requirement would not be practical.

Article 6
Control and supervision of procurement

36. In connection with paragraph (1), it was noted that the necessity for the procuring entity to obtain approval of an action or decision, and the organ that was to give the approval, might vary depending on the action or decision in question. The view was accordingly expressed that the paragraph was unsatisfactory in the current form, as it treated all cases of approval in an identical manner. As a means of remedying that situation, a proposal was made that the paragraph be deleted, and that each provision of the model law requiring approval of an action or decision set out the circumstances in which the approval must be sought and identify the organ that was to give the approval. It was observed, however, that the proposal would complicate the drafting of the model law. Another view was that, rather than requiring approval of a higher authority as a means of ensuring the conformity of an action or decision with the model law, the model law should set forth precise rules and criteria for taking the action or decision so as to minimize the possibility of misapplication or abuse.

37. An observation was made that paragraph (2) seemed to involve a degree of centralization of control and supervision over procurement that might not be regarded as desirable in some countries.

38. A view was expressed that, as the questions dealt with by article 6 were related to the issue of redress and remedies, further consideration of the article should be deferred until the Working Group considered that issue. The Working Group decided to take note of the views that had been expressed and to postpone reaching final decisions concerning the questions that had been raised.

Article 7
Methods of procurement and conditions for their use

39. Support was expressed for the alternative approach to article 7 that was described in paragraph 1 of the commentary to the article. Under that approach, the procuring entity would be free to decide which method of procurement to use in a particular case. The prevailing view, however, favoured the approach currently reflected in the text of article 7, under which tendering was the preferred method of procurement and methods other than tendering could be used only in specified circumstances. The possibility of presenting both approaches to implementing States, which would choose the alternative that they preferred, was also mentioned.

40. With respect to the threshold values provided for in paragraphs (2) and (3), a view was expressed that reference should be made to the estimated value of the procurement contract rather than to the price of the contract, since the price would not be known when the decision as to which procurement method to use would be made. A contrary view was that the threshold values should be set forth in the model law itself, rather than in the procurement regulations, since some States might not promulgate such regulations.

41. Providing for procurement by competitive negotiation proceedings, as they were conceived in the current text of the model law, was said to be dangerous, as the ability of the procuring entity to negotiate confidentially with several contractors and suppliers simultaneously could lead to abuse and corruption. The prevailing view, however, was that it was desirable to provide for competitive negotiation proceedings for cases where tendering was not a suitable method of procurement.

42. There was, however, significant support for expanding the circumstances in which competitive negotiation proceedings could be used. It was proposed that, in addition to the circumstances currently mentioned in paragraph (2), competitive negotiation proceedings be permitted where it was not possible to formulate specifications for the goods or construction to be procured with the precision necessary to engage in tendering proceedings; where the procuring entity sought proposals for the most advanced or the most appropriate technology; where only one responsive tender had been submitted; and where the prices of submitted tenders did not result in fair value to the procuring entity. Similarly, there was significant support for expanding the circumstances in which single-source procurement could be used. It was proposed that, in addition to the circumstances currently mentioned in paragraph (3), single-source procurement be permitted where necessary to promote national socio-economic objectives; where a particular contractor or supplier had exclusive rights to the desired technology; where it was necessary to develop a particular source of supply for strategic reasons; and in cases of additional deliveries by the original supplier or where the scope or volume of a procurement requirement exceeded the normal capacity of the industry so that special facilities would have to be built by the contractor or supplier deemed to be the one with the most related experience. (See, also, paragraph 182, below.)

43. The Working Group engaged in further consideration of article 7(2) and 7(3) during its consideration of article 34. The discussion of the Working Group in that connection is set forth in paragraphs 213, 214 and 219, below.

44. It was stated that the reference to the need for secrecy in paragraph (3)(f) could defeat transparency and that reference should be made instead to the protection of national security and to national defence.

Articles 8 and 9
Eligibility and qualifications of contractors and suppliers

45. It was generally agreed that article 8 and article 9 be merged, as the subject-matter of both articles was essentially the same, namely, the assessment by the procuring entity of the suitability of contractors and suppliers to perform the contract. In consequence of that decision, it was proposed that the word "eligibility" be deleted from the text of the model law. An opinion was expressed that the relevance of the articles would be diminished where the goods or construction needed by the procuring entity was available only from a single source, since the procuring entity would have no alternative other than to procure from that source.

46. It was generally agreed that the right of the procuring entity to require contractors and suppliers to submit information to establish their qualifications be subject to the right of contractors and suppliers to protect their legal interests in proprietary technology or other intellectual property.

47. It was proposed that the reference to "written statements" be deleted from the chapeau of article 8(1)(a), from article 9 and from other provisions in the text, since that term was covered by the term "documentary evidence".

48. Various proposals were made with respect to the criteria set forth in paragraph (1)(a) of article 8. A view was expressed that the law of the State of the contractor's or supplier's nationality should be relevant for establishing the legal capacity of a contractor or supplier to conclude a procurement contract. It was suggested that a reference to receivership be added to paragraph (1)(a)(ii).

49. A proposal was made that paragraph (1)(a)(iv) of article 8 be deleted on the ground that problems could arise in applying that provision, for example, in relation to a contractor or supplier that had been convicted of a crime but had later been granted a pardon. Another proposal was that the provision be retained and that a criterion be added to the effect that the contractor or supplier must not have been held liable for damages in civil proceedings within the preceeding five years.

50. It was generally agreed that paragraph (1)(a)(v) of article 8, in which the implementing State could insert additional criteria, be deleted, since some criteria that might be added could be inconsistent with the underlying policies of the model law, and since the addition of differing criteria by various States would be counter-productive to the objective of uniformity of law.

51. A proposal was made that paragraph (1)(b) of article 8 include a specific reference to the right of the procuring entity to inspect the books of the contractor or supplier.

52. It was generally agreed that a provision along the lines of paragraph (3) of article 8, which appeared within square brackets in the current draft of the model law, be retained. That provision enabled a contractor or supplier to participate in procurement proceedings under certain conditions even if it had not yet conformed to the required criteria. A proposal was made that the contractor or supplier be required to establish its conformity with the criteria by a specified time. A further proposal was that the right of the contractor or supplier to participate in the procurement proceedings be made subject to the efficient operation of the procurement system, as such a provision would bring the model law in line with the GATT Agreement on Government Procurement.

53. The content of article 9 was regarded as broadly acceptable, subject to possible additions and improvements. Proposals were made that additional criteria relating to the qualifications of contractors and suppliers be referred to, including managerial capability, reliability, experience and reputation. Another proposal was that the article specify that a contractor or supplier would be disqualified if it had been found guilty by a competent court or tribunal of a serious misrepresentation in its submissions to the procuring entity regarding its qualifications or its products.

54. It was generally agreed that the criteria that were to be applied in any procurement proceedings should relate to the suitability of contractors and suppliers to perform the particular procurement contract that was to result from those proceedings.

Article 10
Rules concerning written statements and documentary evidence provided by contractors and suppliers

55. Questions were raised as to the usefulness and desirability of article 10. It was observed that, since the provisions of the article relating to the attestation and acceptability of documentary evidence referred to national law, they served little purpose and did not contribute to uniformity of law. Moreover, the requirement that documentary evidence be solemnized before and attested to by a notary or other competent authority was only of limited usefulness, since the notary or other authority could verify only the identity of the signer of the document, and not the accuracy of its contents.

56. The article as it currently appeared was said to be too strict and rigid because it required the formalities to legalize documents in all cases, whereas in some cases those formalities might be unnecessary. It was noted that the time that it could take to comply with the formalities could prevent contractors and suppliers from submitting tenders on time. Accordingly, it was generally agreed that, if article 10 were to be retained, it should provide rules only for cases where the procuring entity required that documents be legalized.

Article 11
International tendering proceedings

57. The substance of paragraph (1), under which the procuring entity could decide to engage in international tendering proceedings, was found to be generally acceptable. It was generally agreed, however, that the meaning of "international tendering proceedings" required clarification.

58. With respect to paragraph (2), it was generally agreed that international tendering proceedings should not be mandatory. Rather, the article should alert the procuring entity that international tendering proceedings were desirable in some cases, e.g., where the goods or construction to be procured were of a high value, where the goods or construction were not available domestically or where there existed no competition among domestic contractors and suppliers.

59. A proposal was made that paragraph (2) be reformulated so as to require that, when the estimated value of the procurement contract exceeded a specified amount, the procuring entity must solicit tenders from the maximum number of domestic and foreign contractors and suppliers consistent with the efficient operation of the procurement system. The proposal was said to be a means of bridging the gap between those who favoured making international tendering proceedings mandatory when the value of the procurement exceeded a threshold amount and those who opposed making international tendering proceedings mandatory.

Article 12
Solicitation of tenders and applications to prequalify

60. With respect to paragraph (1), it was proposed that provision be made for solicitation of tenders by means of electronic transmission, and even by telephone in appropriate cases (e.g., in cases of urgency or where the value of the goods or construction to be procured was low).

61. It was observed that the restricted tendering procedures provided for in paragraph (2) provided an important safety valve for the procuring entity by enabling it to exclude contractors and suppliers that it did not regard as appropriate to perform the contract. It was suggested that the paragraph indicate clearly the types of circumstances in which a procuring entity would be entitled to resort to restricted tendering, perhaps by incorporating the considerations mentioned in paragraph 2 of the commentary. Another proposal was that the words "notwithstanding the provisions of paragraph (1)" be inserted at the beginning of paragraph (2) in order to reduce the possible appearance of an inconsistency between paragraphs (1) and (2).

Article 13
Lists of approved contractors and suppliers

62. The Working Group decided to delete article 13 for the following reasons. The use of lists of contractors and suppliers for the solicitation of tenders was diminishing and, in any event, should not be encouraged because the lists could be used in a manner that would unfairly discriminate against particular contractors and suppliers. Moreover, the article as currently drafted contained some uncertainties and ambiguities, such as whether or not, when a list existed, tenders could be solicited from contractors and suppliers that were not on the list; whether or not tenders must be solicited from all contractors and suppliers on the list; and whether or not the list had to be used at all for the solicitation of tenders. If the list did not have to be used, or if tenders could be solicited from contractors and suppliers that were not on the list, the necessity for and usefulness of article 13 was questionable. However, the Working Group agreed that it would be useful to include in the commentary to the model law some discussion of the use of the lists of approved contractors and suppliers.

63. In favour of retaining the article, the view was expressed that, if appropriately modified, the article could serve to eliminate uncertainty as to whether or not a procuring entity could employ such lists. In addition, it was said that the article could contribute to fairness and transparency in connection with the use of the lists.

Article 14
Contents of notice of proposed procurement

64. The Working Group considered that article 14 was largely satisfactory, subject to the following improvements. In paragraph (1), it should be clarified that the specified information to be included in the notice of proposed procurement was only the required minimum. That clarification might be accomplished by inserting the words "at least" after "contain" in the chapeau of the paragraph. The paragraph should also require the notice of proposed procurement to state if a tender security was required and the nature and amount of the security, the criteria to be used for assessing the qualifications of contractors and suppliers, and the right of aggrieved contractors and suppliers to seek redress for a failure by the procuring entity to comply with the procurement law or regulations.

65. A suggestion, which was not accepted, was made either to delete or to modify the statement in the chapeau of paragraph (2) which was to the effect that, when prequalification proceedings were to be engaged in, the notice of

proposed procurement need not contain information as to how, where and in what languages the procurement documents could be obtained. It was noted that the information would not be needed when prequalification proceedings were used because, pursuant to article 17, the procurement documents would be provided automatically to contractors and suppliers that were prequalified.

Article 15
Assessment of qualifications of contractors and suppliers

66. The Working Group noted that article 15 contained rules to implement, in the context of tendering proceedings, the general principles set forth in article 9 concerning the qualifications of contractors and suppliers. It was suggested that the duplication that existed between article 9 (which, as previously decided, would be merged with article 8; see paragraph 45, above), and article 15 be avoided by consolidating those articles. In addition to reducing duplication, such a consolidation would make the model law easier to understand and apply and would avoid inconsistencies.

67. Views were expressed that certain terms used in article 15 and in the commentary required clarification, including "assess" (used in paragraph (1)), "unduly" (used in paragraph (3)), "evaluation of qualifications" (used in paragraph 1 of the commentary) and "minimum thresholds of acceptability" (used in paragraph 1 of the commentary).

68. A proposal was made that the qualification criteria listed in paragraph (2) be expanded to include the experience of contractors and suppliers, their past performance of similar contracts and their capabilities with respect to personnel and equipment. Another proposal was that reference be made to the technical, commercial, legal, financial and managerial competence of contractors and suppliers.

69. According to another proposal, it should be clarified, perhaps in the commentary, that paragraph (3) was directed both to discrimination against foreign contractors and suppliers in general and to discrimination among classes of foreign contractors and suppliers.

70. It was agreed that article 15 should contain an express reference to postqualification proceedings. Those proceedings were said to be necessary in order to reconfirm, at the time of acceptance of a tender, the qualifications of a contractor or supplier that had been prequalified, when there was a significant time lag between the prequalification proceedings and the time of acceptance of a tender. It was also agreed that only the qualifications of the contractor or supplier whose tender had been accepted should be reconfirmed in postqualification proceedings. (See, also, paragraph 78, below.)

71. It was agreed that the sentence, "In some cases where contractors and suppliers have been prequalified, their qualifications may be assessed more closely after the opening of tenders", be deleted from paragraph 1 of the commentary, since the qualifications of a contractor or supplier that had been prequalified should not be examined again until postqualification proceedings.

Article 16
Prequalification proceedings

72. It was suggested that the article make it clear that a contractor or supplier that had not participated in prequalification proceedings could not submit a tender.

73. A suggestion was made that the meaning of the opening words of paragraph (1) be clarified to the effect that, when restricted tendering proceedings were used, prequalification proceedings were not held, in order to avoid a possible implication that the qualifications of contractors and suppliers were not to be examined at all in restricted tendering proceedings.

74. It was observed that certain types of information required by paragraph (3) to be included in the prequalification documents were also required by article 14 to be included in the notice of proposed procurement. That duplication was said to be desirable because the notice of proposed procurement and the prequalification documents served different purposes, and it was useful to contractors and suppliers for the information to be contained in both locations.

75. A proposal was made that paragraph (3)(b) be deleted, since the requirement contained in that provision was expressed in vague and general terms and would thus have little practical effect.

76. It was generally agreed that paragraph (3)(h) be deleted, and that the paragraph provide instead that the procuring entity must be prepared on request to explain the procurement practices and procedures to any contractor or supplier.

77. In connection with paragraph (4), the view was expressed that the names of contractors and suppliers that had been prequalified should be made public only after a tender had been accepted.

78. It was generally agreed that paragraph (6) be re-drafted so as to require the procuring entity to reconfirm in postqualification proceedings the qualifications of the contractor or supplier whose tender had been accepted. Furthermore, the criteria to be used for that postqualification should be the same as those used in the prequalification proceedings, and should be set forth in the procurement documents. It was also agreed that the paragraph provide what was to occur if the contractor or supplier whose tender had been accepted was found in postqualification proceedings no longer to meet the qualification criteria (e.g., provide that the next lowest tender was to be accepted or that new procurement proceedings were to be engaged in). (See, also, paragraph 70, above.)

Article 17
Provision of procurement documents to contractors and suppliers

79. The Working Group found the substance of article 17 to be acceptable.

Article 18
Contents of procurement documents

80. A view was expressed that the article should identify which portions of the procurement documents and which information contained in those documents were to become part of the procurement contract.

81. It was observed that several subparagraphs of the article referred to issues that were dealt with elsewhere in the model law. A proposal was made that cross-references be included in those subparagraphs in order to facilitate the use and understanding of the model law.

82. A proposal was made that the word "all" be deleted from the chapeau of the article since the requirement that all necessary information be provided could give rise to disputes if an item of information claimed to be necessary were to be omitted from the procurement documents.

83. A proposal was made that the chapeau of the article be expanded so as to require the procurement documents to contain not only information necessary for the submission of responsive tenders but also the rules governing the opening, examination and evaluation of tenders.

84. It was observed that certain types of information required by article 18 to be included in the procurement documents were also required by article 14 to be included in the notice of proposed procurement. That duplication was said to be desirable because the notice of proposed procurement and the procurement documents served different purposes, and it was useful to contractors and suppliers for the information to be contained in both locations.

85. A suggestion was made that subparagraph (e) employ any relevant wording used in the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

86. A proposal was made that subparagraph (f) specifically require the procurement documents to include information as to the law applicable to the contract and the means of settling disputes under the contract.

87. It was suggested that subparagraph (g) refer not only to alternative tenders that were solicited, but also to alternative tenders that were permitted.

88. A proposal was made that subparagraph (i) specifically require the procurement documents to include information as to the pricing terms of the contract (e.g., unit price; lump sum), as to whether or not taxes, customs duties and similar charges and levies were to be included in the contract price, and as to which party was to bear the risk of higher costs resulting from changes in laws relating to taxes, customs duties and similar charges and levies and from changes in other laws affecting the performance of the contract. (See paragraph 114, below.)

89. It was agreed that subparagraph (j) be deleted because it was not in the interests of the procuring entity to establish a maximum price, a minimum price or a range of prices. (See, also, paragraph 182, below.)

90. A proposal was made in connection with subparagraph (m) that the procurement documents indicate whether and under what conditions the procuring entity would consider tenders submitted late.

91. It was proposed that subparagraph (n) be altered so as to refer to a meeting of contractors and suppliers "that may be convened" by the procuring entity.

92. In the context of subparagraph (p), there was said to be a danger that terms such as "most advantageous tender" and "evaluate" could be misinterpreted as giving the procuring entity too much discretion with respect to the choice of a tender, notwithstanding the fact that "most advantageous tender" was defined in article 28(7)(c). It was proposed that wording be employed that avoided the possibility of such a misinterpretation. In that connection, the view was expressed that a tender should be chosen on the basis of price and other objective and quantifiable criteria. According to another view, however, that approach was too strict, as it would prevent a procuring entity from taking into account other legitimate criteria, which were not easily quantifiable, such as socio-economic factors in the country of the procuring entity. Apart from those differing views, it was agreed that the procurement documents should set forth all criteria that would be taken into account by the procuring entity in choosing a tender.

93. Views were divided with respect to subparagraph (s). Several arguments were advanced in favour of retaining the subparagraph, including its reference (set forth within square brackets) to various types of laws and regulations pertinent to the performance of the contract. It was observed that it was important for contractors and suppliers to be aware of laws and regulations pertinent to the tendering proceedings and to the performance of the contract. There often existed a variety of types of pertinent laws and regulations, and without a provision of the nature of subparagraph (s) it would often be difficult for contractors and suppliers to become aware of them. Foreign contractors and suppliers, and those that had no previous experience with public sector tendering proceedings in the implementing State, would be at a particular disadvantage. It was stated that the subparagraph did not impose an undue burden on the procuring entity, since it required only that references be given to the pertinent laws and regulations; it did not require the procuring entity to provide the contents or an analysis of the laws and regulations. It was further observed that the subparagraph could be beneficial not only to contractors and suppliers, but also to the procuring entity, since the provision would contribute to the efficient conduct of the tendering proceedings and would help ensure that the performance of the procurement contract was in compliance with pertinent laws and regulations.

94. Several arguments were advanced in opposition to the subparagraph. It was stated that it was inappropriate to require the procuring entity to give legal advice to contractors and suppliers. Rather, contractors and suppliers should be expected to obtain their own competent professional legal advice in the ordinary course of doing business. The requirements of subparagraph (s) were said to be excessively burdensome because the laws and regulations pertinent to tendering proceedings and to the performance of the contract were sometimes numerous and complex. In that regard, it was also pointed out that particular problems arose in countries with federal systems where various aspects of the procurement proceedings and of the performance of the procurement contract could be subject to national laws as well as to laws of subdivisions of the federation; it was sometimes difficult to ascertain

which of those laws would apply. It was further stated that merely requiring the procuring entity to give references to the pertinent laws and regulations was of little benefit to contractors and suppliers, who would require advice as to the content, meaning and application of the law and regulations.

95. A view was expressed that the appropriateness of the subparagraph depended to some extent on the consequences that would accrue if a reference to a particular law or regulation was incorrect or was omitted from the procurement documents. One view was that, in such a case, the procuring entity should bear legal responsibility for such errors or omissions. For example, in appropriate cases, the contractor or supplier whose contract had been accepted and who incurred increased costs in the performance of the contract due to an error or omission should be entitled to an adjustment of the contract price. With respect to that point, however, it was stated that the question of price adjustment should be dealt with in the contract, and not in the model procurement law. Another view was that, if the subparagraph were to be retained, the procuring entity should bear no legal responsibility for an erroneous reference to or an omission of a law or regulation. With respect to that point, however, it was observed that an exoneration from liability would, in cases of gross negligence, be inconsistent with policy in some legal systems.

96. As a means of making the requirements of the subparagraph less onerous for the procuring entity, a proposal was made that the subparagraph be redrafted so as not to require the procuring entity to provide an exhaustive list of pertinent laws and regulations. A further proposal was that subparagraph (s) be reformulated so as to require the procuring entity to be prepared on request to explain the procurement practices and procedures to any contractor or supplier. It was observed, however, that the proposed formulation went beyond merely providing references to the pertinent laws and regulations, and thus could impose a more onerous obligation on the procuring entity than the current formulation of the subparagraph. Yet another proposal was that a distinction be drawn between the two types of laws and regulations currently referred to in the subparagraph, by obligating the procuring entity to provide references to laws and regulations pertinent to the tender proceedings and to bear responsibility for an error in or omission of a reference, but taking a less strict approach with respect to laws and regulations relating to the performance of the contract.

97. The trend of the discussion was to the effect that the current formulation of subparagraph (s) imposed too onerous a burden on the procuring entity. The Secretariat was requested to reformulate the subparagraph for the next draft of the model procurement law on the basis of the discussion.

98. With respect to subparagraph (t), it was agreed that an express provision be added to the effect that contractors and suppliers be able to communicate directly with the procuring entity without going through an intermediary.

99. It was agreed that article 18 require the following additional information to be included in the procurement documents: any countertrade obligations imposed by the procuring entity, the organ or organs responsible for exercising supervision and control over procurement, and the right of contractors and suppliers to redress for a failure by the procuring entity to conform to the procurement law and regulations.

Article 19
Charge for procurement documents

100. A view was expressed that the article should be redrafted so as to provide that the charge for the procurement documents may not exceed the cost of printing the documents and distributing them to contractors and suppliers. According to another view, however, the article was satisfactory in its current form, which provided that the charge "shall reflect" the printing and distribution costs, since it was not practicable to require the procuring entity to calculate precisely the costs of printing and distributing the documents.

101. A question was raised as to whether, under the current formulation of the article, the procuring entity could include in the charge for the procurement documents any taxes imposed on the procuring entity in connection with printing the documents.

102. A proposal was made that the words "excessively high charges", which appeared in the commentary, be reconsidered, since those words could suggest that factors other than the cost of printing and distributing the procurement documents could be taken into account in setting the charge.

Article 20
Rules concerning formulation of prequalification documents and procurement documents

103. It was suggested that the title of the article be re-drafted so as to indicate more clearly the subject-matter dealt with in the article.

104. It was observed that paragraph (1) was of a preambular, rather than normative, character and thus was of questionable utility in its current form.

105. A view was expressed that the first reference in paragraph (1) to obstacles to participation by contractors and suppliers in tendering proceedings should be modified so as to refer to "unnecessary" obstacles.

106. A view was expressed that an attempt should be made to draft paragraph (3) more concisely.

107. Support was expressed for the requirement in paragraph (3)(c) that international standards be used where available. According to another view, however, the procuring entity should be able to depart from international standards in certain circumstances, i.e., when those standards were incompatible with existing equipment or when the procuring entity wished to obtain a particular technology. A further proposal was that the procuring entity should use international standards except when they were inconsistent with or less stringent than national standards.

108. The prevailing view, however, was that no preference should be accorded to international standards and that the procuring entity should have the flexibility to use whichever standards it considered to be more appropriate for a particular procurement. In that connection, it was noted that countries varied in their ability to adapt to international standards.

109. With respect to paragraph (4), a view was expressed that the requirement that, in international tendering proceedings, the procurement documents and the prequalification documents must be formulated in a "language customarily used in international trade" was imprecise and could lead to disputes as to whether the language used in a particular case was one customarily used in international trade. The possibility was raised of specifying in the model law which languages could be used (e.g., official languages of the United Nations).

110. A view was expressed that it was excessively burdensome to require the procuring entity to prepare two sets of documents, one in an official language of its country and the other in a language customarily used in international trade. It was stated that the procuring entity should be able to issue the documents in only one of those languages.

111. A view was expressed that the rule set forth in the last sentence of the paragraph that, in the event of a conflict between language versions, the version in the language customarily used in international trade shall prevail, would be difficult for some implementing States to accept and would not necessarily be followed by courts in all countries.

Article 21
New or amended laws or regulations relating to taxes, customs duties or similar charges, or affecting performance of procurement contract

112. In connection with its consideration of the article, the Working Group also considered paragraph 6 of the commentary to article 18.

113. Support was expressed for article 21, under which the procuring entity was to bear any extra costs incurred by the contractor or supplier in performing the contract due to new laws or regulations of the State of the procuring entity or due to changes in existing laws and regulations. It was stated that, particularly in the case of works contracts, the rule enabled contractors and suppliers, in preparing their tenders, to assess more accurately the costs of performing the contract and avoided the necessity to include in their tender prices an increment to reflect the risk of higher costs due to changes in the laws or regulations.

114. The prevailing view, however, was that the article should be deleted. In support of that view, it was said that flexibility should be provided so as to enable the question of which party was to bear the additional costs arising from changes in laws and regulations to be settled in accordance with the circumstances of each procurement. In some cases, for example, the contract might treat those costs as reimbursable costs. It was also agreed that the procurement documents should indicate which party was to bear the costs (see paragraph 88, above). Furthermore, it was agreed that paragraph 6 of the commentary to article 18 be retained. A proposal was made that the paragraph mention the possibility that, when enacting the model law, the implementing State might include an express provision as to which party was to bear the costs in question.

Article 22
Clarifications and modifications of procurement documents

115. With respect to paragraph (2), it was generally agreed that the procuring entity should be able to modify the procurement documents only if it reserved the right to do so in those documents. It was also agreed that, where the procuring entity modified the procurement documents, it should be required to extend the deadline for submission of tenders if necessary in order to allow contractors and suppliers to seek and obtain clarifications of the modification or to amend or withdraw their tenders.

116. A view was expressed that the model procurement law should enable contractors and suppliers to recover any additional costs incurred by them as a result of a modification of the procurement documents.

117. It was suggested that the words "or in any other form that preserves a record of the request, response or addendum" which appeared in paragraph (3), and similar formulations that appeared elsewhere in the text, be examined to ensure that they covered such means of communication as telex and telefax. In addition, a view was expressed that requests for clarification and responses to those requests, and other communications provided for in the text, should be able to be made by telephone, provided that a written confirmation of the communication was dispatched immediately afterwards.

118. In connection with paragraph (4), it was suggested that greater prominence be given to the usefulness of pre-tender meetings of contractors and suppliers in appropriate cases (e.g., in the case of procurement of complex or high-value goods or construction). A query was raised as to the necessity for the requirement that the minutes of the meeting not identify the sources of requests for clarification of the procurement documents. It was pointed out that, except in the case of requests submitted in writing, participants at the meeting would know the sources of requests made at the meeting.

Article 23
Language of tenders

119. It was generally agreed that article 23 should be simplified by providing that tenders may be formulated in any language in which the procurement documents were issued.

Article 24
Submission of tenders

120. With respect to paragraph (1), it was generally agreed that the amount of time allowed for the submission of tenders should take into account not only the time needed by contractors and suppliers, but also the reasonable needs of the procuring entity. A question was raised as to what consequences would accrue to the procuring entity if the time allowed was too short.

121. It was agreed that the procuring entity should be obligated, and not merely permitted, to extend the deadline for submission of tenders under the circumstances referred to in paragraph (2)(a)(i), i.e., to enable contractors and suppliers to react to a clarification or modification of the procurement documents.

122. A proposal was made that paragraph (2)(a)(ii) be deleted. According to that provision, the procuring entity could extend the deadline if, due to unforeseen circumstances, it was not possible for contractors or suppliers to submit their tenders by the deadline. It was said that the phrase "due to unforeseen circumstances" was vague and could give rise to disputes. The prevailing view was that provision for extension of the deadline in the case envisaged was important; however, in contrast to its decision with respect to paragraph (2)(a)(i), the Working Group agreed that an extension under paragraph (2)(a)(ii) should be at the option of the procuring entity. The Working Group further agreed that the situation referred to in paragraph (2)(a)(ii) should not be the only case in which the procuring entity had the option to extend the deadline, and that the provision should be drafted to encompass the possibility of extending the deadline in other situations.

123. The Working Group agreed to the deletion of the sentence within square brackets in paragraph (3), which provided that a tender submitted after the deadline for submission of tenders could be considered if the contractor or supplier was not able to submit its tender by the deadline due to reasons beyond its control. First, the formulation was found to be too general; it thus could give rise to disputes and was susceptible to abuse. Secondly, the consideration of a late tender, even in good faith, could give rise to at least an appearance of impropriety, which could impugn the integrity of the procurement process. In opposition to the deletion of that provision, it was said that the procuring entity should have the flexibility to consider a late tender in appropriate circumstances. (See, also, paragraph 150, below.)

Article 25
Period of effectiveness of tenders; modification and withdrawal of tenders

124. With respect to paragraph (2)(a), it was agreed that requests by the procuring entity for extensions of the period of effectiveness of tenders be discouraged by providing that extensions may be requested only in exceptional circumstances. In that connection, mention was made of an undesirable practice by which procuring entities sometimes pressured contractors and suppliers to grant an extension by threatening to claim under the tender securities supplied by the contractors and suppliers. It was further agreed that the provision clarify that, if a contractor or supplier did not agree to extend the period of effectiveness of its tender, it could participate no further in the tendering proceedings.

125. It was agreed that paragraph (2)(b) be modified so as to provide that the procuring entity "shall" require contractors and suppliers that extend the period of effectiveness of their tenders to extend also the period of effectiveness of their tender securities or to provide new securities, in order to provide protection for the procuring entity in respect of the extended period of effectiveness of the tender.

126. In connection with paragraph (3), various views were expressed as to whether or not a contractor or supplier should be able to modify or withdraw its tender prior to the deadline for the submission of tenders. One view was that it should not be possible to do so, because to permit modification or withdrawal of tenders after they had been submitted could lead to abuse and improprieties. Another view was that whether a tender could be modified or withdrawn prior to the deadline for submission of tenders should depend on the circumstances of each procurement; and that it should be stated in the

procurement documents whether a tender could be modified or withdrawn. Yet another view was that withdrawal of a tender was not likely to lead to abuse or improprieties and should be permitted, but the ability to modify a tender presented dangers, and should be precluded. A further view was that modification and withdrawal of tenders could not lead to abuse or improprieties, particularly if tenders remained sealed, and that paragraph (3) should be retained in its current form. In connection with that view, it was stated that the ability to modify or withdraw tenders was often recognized in practice. In addition, it was pointed out that modification of a tender would be beneficial to the procuring entity if it resulted in a lower tender price.

127. After the discussion, the Working Group considered that it was not yet able to take a decision on the question. It requested the Secretariat to investigate the practice with respect to the modification and withdrawal of tenders, and the related question of forfeiture of a tender security if a tender were to be modified or withdrawn, and to communicate the results of that investigation to the Working Group at its next session.

Article 26
Tender securities

128. It was emphasized that the procurement documents should specify the nature, amount and terms and conditions of the tender security to be provided by contractors and suppliers and the types of institutions from which securities would be acceptable, as provided in article 18(1). It was also agreed that it may in some cases be desirable for the procuring entity to provide options with respect to the nature of the security and the issuing institution, and that the possibility of specifying those options should be made clear in articles 2(f) and 18(1). It was also said to be desirable for the commentary to provide guidance to the procuring entity with respect to the various aspects of the tender security to be required.

129. The principle underlying paragraph (1)(b), namely, to avoid requirements with respect to tender securities that would create obstacles to participation in tendering proceedings by foreign contractors and suppliers, was regarded as important. It was agreed that the procuring entity should not be able to stipulate that the tender security must be issued by a local institution. It was also agreed, however, that the provision be reformulated so as to provide that the issuer of the tender security, whether a foreign or a local institution, must be acceptable to the procuring entity. In particular, the procuring entity should be able to evaluate the credit-worthiness of the institution issuing the security. In that connection, it was suggested that a mechanism be provided whereby a contractor or supplier proposing to provide a tender security issued by a foreign institution could consult with the procuring entity to obtain its approval of the tender security prior to submission of the tender. According to another proposal, provision should be made for the procuring entity to specify in the procurement documents which foreign institutions would be regarded as acceptable.

130 It was observed that procuring entities sometimes required tender securities issued by a foreign institution to be confirmed by a local institution. A view was expressed that the practice should be discouraged. One reason for that view was that foreign institutions were sometimes unable to arrange for confirmation of a security before the deadline for submission of tenders.

131. It was noted that it was unclear whether the words "the type or a type", used in paragraph (1)(b), referred to the type of institution or to the type of tender security.

132. In support of the policies behind paragraph (2), it was said to be important for the model law to contain clear rules concerning the time after which a claim under the tender security could no longer be made and the time when the security must be returned to the contractor or supplier that provided it. Such rules were said to be necessary because procuring entities sometimes improperly claimed under tender securities and refused to return them when they should be returned. However, it was observed that the Commission's Working Group on International Contract Practices was preparing a uniform law on independent guarantees and stand-by letters of credit, and a view was expressed that consideration of paragraph (2) should be deferred to await the outcome of the work. That would enable the Working Group on the New International Economic Order to take into account the results of the work on independent guarantees and stand-by letters of credit, and would avoid any conflicts with or prejudgement of those results. The prevailing view, however, was that it was useful to deal with paragraph (2) at the current stage of the preparation of the model procurement law, since it concerned issues raised by the use not only of guarantees, but also of other types of securities, in the particular context of tendering proceedings. It was doubted whether there would be any overlap with the work of the Working Group on International Contract Practices. It was also noted that, to the extent that it was relevant to tender securities, the progress of that work could be taken into account before the model procurement law was finalized.

133. Paragraph (2) was found to be broadly acceptable. However, a proposal was made that paragraph (2)(a) be modified so as to refer to the time when the tendering proceedings terminated, instead of the time when the tender security expired. In addition, it was agreed that the listing in paragraph (2), of the circumstances in which a claim under the tender security could no longer be made and the security must be returned, be expanded by referring also to the withdrawal of the tender and the tender security, if permitted (see paragraphs 126 and 127, above), prior to the deadline for submission of tenders.

134. A suggestion was made that article 26 deal with the case where a tender security was required only after the opening of tenders and only from certain contractors and suppliers. The prevailing view, however, was that a tender security should be provided at the time of submission of the tender in order to provide sufficient protection to the procuring entity.

135. A proposal was made that a provision be included, either in article 26 or in article 2(f), indicating the obligations that were to be secured by the tender security. Such a provision might be based upon the discussion of that issue in paragraphs 1 and 7 of the commentary.

136. A proposal was made that the reference in paragraph 1 of the commentary to securities which could be claimed without having to prove a default by the contractor or supplier be deleted, since that type of security should not be encouraged.

Article 27
Opening of tenders

137. In connection with paragraph (1), a view was expressed that there should be no time gap between the deadline for the submission of tenders and the opening of tenders. It was said that opening tenders at the deadline for submission of tenders or immediately thereafter would promote transparency and minimize the opportunity for interference with or manipulation of tenders. It was generally agreed that the drafting of the paragraph should be improved so as to clarify that the words "or an extension thereof" referred to the deadline for the submission of tenders, rather than to the time of opening tenders. One suggestion in that regard was to delete the words "or an extension thereof", as they were unnecessary.

138. With respect to paragraph (2), it was generally agreed that the opening of tenders should be public, i.e., in the presence of contractors and suppliers or their representatives. It was noted, however, that in certain countries tenders were not opened publicly, in order to preserve confidentiality in the tendering proceedings. In response, it was stated that confidentiality could be adequately preserved even when tenders were opened in public by requiring tenders to be sealed and by announcing at the opening only the names and addresses of the contractors and suppliers and their tender prices.

139. It was recognized that certain exceptions to the public opening of tenders might be appropriate. Possible exceptions mentioned were cases where national security or national defence were involved, although it was observed that tendering proceedings might not be appropriate in such cases. In that connection, a proposal was made that those cases be excluded entirely from the scope of the model law. If such exclusions were made optional, the procuring entity would be free to apply the rules and procedures contained in the model law in cases of national security and of national defence when it wished to do so. The Secretariat was requested to prepare a provision to that effect for the next draft of the model law.

140. Another possible exception to the public opening of tenders was said to be cases where tenders were submitted electronically or by telephone. In opposition, however, it was noted that tenders should be required to be submitted in writing and in sealed envelopes. Yet another possible exception was the case of low-value contracts, where the formalities of public opening of tenders would be counter-productive to the objectives of economy and efficiency.

141. It was generally agreed that exceptions to the public opening of tenders should be permitted, if at all, in only a limited number of cases, and that the criteria for invoking an exception should be strictly and narrowly formulated.

142. A suggestion was made that paragraph (3) require the names and addresses of contractors and suppliers and their tender prices to be recorded immediately in the minutes of the tendering proceedings provided for in article 33, in order to prevent improprieties. An additional proposal was that the paragraph require such information to be communicated to any contractor or supplier that had submitted a tender but that was not present or represented at the opening of tenders.

143. With respect to paragraph 2 of the commentary, a question was raised as to the desirability of having tenders opened by a committee.

Article 28
Examination, evaluation and comparison of tenders

Paragraph (1)

144. The Working Group decided to retain the rule set forth in paragraph (1)(a) permitting a procuring entity to seek clarifications from contractors and suppliers of their tenders. A concern was expressed, however, that, despite the prohibition against changes in the tender price or other matters of substance in the tender, the ability to clarify tenders might provide opportunities for abuse.

145. The understanding of the Working Group was that paragraph 1(b) referred to errors in computation that were apparent on the face of the tender and did not encompass, for example, abnormally low tender prices that were suspected to result from misunderstandings or errors that were not apparent from the face of the tender.

146. Various views were expressed as to how the errors covered by that provision should be treated. One view was that the procuring entity should be able to correct those errors on its own initiative, without consulting with the contractor or supplier. In opposition, that approach was said to present dangers of abuse. It was said to be preferable to bring the errors to the attention of the contractor or supplier and give it the opportunity either to confirm its figures or to withdraw its tender. Under a variation of that approach, the contractor or supplier would be given the option either to agree to a correction or to withdraw its tender. According to another proposal, a distinction should be made between simple errors, which the procuring entity should be able to correct on its own initiative, and significant errors, which should be brought to the attention of the contractor or supplier. The contractor or supplier would be asked either to confirm its figures or to agree to a correction or, alternatively, would have the option either to agree to a correction or to withdraw its tender. In opposition to that approach, it was said that the concept of a "significant" error was vague and would give rise to uncertainties and disputes. A further view was that the provision should be deleted altogether, and that the question of how computational mistakes in tenders were to be treated should be left to be resolved by other rules of national law. In opposition to that view, it was pointed out that the occurrence of such errors in practice was not infrequent and that the absence of a provision would produce uncertainty and a lack of uniformity in the treatment of the issue. After discussion, the Working Group agreed that paragraph (1)(b) be retained in its current form for the time being and that it be reconsidered at the next session.

Paragraph (2)

147. A view was expressed that paragraph (2) should be deleted, on the ground that the mechanism of rejection of tenders was not necessary since the procuring entity simply would not accept a tender when a circumstance referred to in the paragraph existed. The prevailing view, however, was that the paragraph should be retained, since the mechanism of rejection was a fundamental feature of tendering proceedings.

148. A proposal was made that paragraph (2) be modified so as to make rejection of tenders on the stated grounds optional, rather than mandatory. The Working Group did not accept the proposal. It was said to be of the essence of formal tendering that a tender must be rejected if it was non-responsive or if the contractor or supplier was unqualified.

149. It was noted that whether or not paragraph (2)(b) should be retained in its current form depended on the eventual decision of the Working Group with respect to paragraph (1)(b).

150. A proposal was made that a provision be added to paragraph (2) to the effect that a tender received after the deadline for the submission of tenders must be rejected. In opposition to the proposal, it was observed that article 24(3), in which that issue was currently dealt with, was a more appropriate context for the treatment of the issue. In that connection, it was noted that tenders received after the deadline for the submission of tenders must be returned unopened to the contractor or supplier; they therefore were not to be regarded as having been submitted and the question of rejection of those tenders did not arise. The Working Group agreed that the proposed addition to paragraph (2) be included for the time being, and that the Working Group would consider at a later stage whether the issue should be dealt with in article 24(3) or in article 28.

Paragraph (3)

151. A proposal was made that paragraph (3) be deleted. In support of the proposal, it was stated that the question of attempts improperly to influence the procuring entity was dealt with by other areas of national law, such as criminal law and laws relating to unfair competition, and was beyond the scope of the model law on procurement. It was also stated that, as currently formulated, the provision gave rise to problems and uncertainties. For example, it was said to be difficult for the procuring entity to substantiate the motives and intentions of the contractor or supplier, and the provision was said to be too broad and therefore susceptible to arbitrary or improper application by the procuring entity. Moreover, it was said to be unfair for a contractor or supplier to be disqualified merely on the basis of an accusation by the procuring entity. Another proposal was that a case of improper influence by a contractor or supplier be dealt with in the section of the model law dealing with disputes and redress.

152. The prevailing view was that the model law should provide a means by which the procuring entity could reject a tender in cases of improper influence by a contractor or supplier. According to that view, therefore, paragraph (3) should be retained; but it should be reformulated in a manner that would eliminate the problems and uncertainties that had been identified in its current formulation. To that end, a suggestion was made that the paragraph specify concrete grounds on which the procuring entity could reject a tender, e.g., an offer of a bribe by the contractor or supplier. The requirement, currently contained in the paragraph, that rejection of a tender for one of the stated grounds must be subject to approval by a higher authority should be retained as a safeguard against improper application of the paragraph. In addition, a record of the rejection and the grounds therefor should be prepared and kept, for the protection both of the contractor or supplier and of the procuring entity.

153. It was generally agreed that the model law should provide a means for review of a rejection of a tender under paragraph (3) and appropriate remedies (e.g., damages) for a contractor or supplier in the event that rejection of its tender was not justified. A suggestion was made that the model law provide for arbitration proceedings to perform that role.

154. The Working Group agreed that the proceedings for review should not delay the tendering proceedings. In that connection, a proposal was made that the contractor or supplier be able to seek review immediately upon rejection of its tender, without, however, interrupting the tendering proceedings. According to another proposal, a contractor or supplier should be able to seek review only after the tendering proceedings had been completed.

155. The Working Group requested the Secretariat to reformulate paragraph (3) for the next draft of the model law, taking account of the discussion at the current session.

Paragraph (4)

156. General agreement was expressed with the principle underlying paragraph (4), namely, that a tender must be rejected if it did not conform in all respects to the requirements set forth in the procurement documents, except where deviations from those requirements were minor. However, the paragraph in its current form was found to give excessive prominence and scope to the concept of minor deviations. It was agreed that the paragraph be reformulated so as to set forth only a general rule to the effect that a procuring entity might regard a tender as responsive if the tender contained only minor deviations from the requirements set forth in the procurement documents, and that "responsive tender" be defined in the article containing definitions (currently article 2). Under that approach, the procuring entity would have the flexibility to determine whether or not a deviation was minor in the context of the particular procurement proceedings. It was stated that an adequate mechanism of review should be provided for disputes as to whether particular deviations were minor. The Working Group agreed that paragraph 4(b) be deleted, as it was unnecessary in view of the approach that had been agreed.

157. It was stated that in some countries strict conformity of a tender with the specifications and other requirements set forth in the procurement documents was not an essential feature of tendering proceedings.

Paragraphs (5) and (6)

158. A question was raised as to whether alternative tenders should play any role in competitive tendering. In that connection, it was said that consideration of alternative tenders conflicted with the essential principle underlying competitive tendering that all tenders must conform to the same specifications and other requirements set forth in the procurement documents. Moreover, the consideration of alternative tenders was said to arise in many cases from an inability of the procuring entity to specify with sufficient precision the technical or other characteristics of the goods or construction that it wished to procure. Accordingly, the view was expressed that alternative tenders should be regarded as analogous to the proposals that were the subject of article 31, and should be dealt with in the context of that article. According to another view, however, alternative tenders were a

reality in tendering proceedings. They played a beneficial role in those proceedings by enabling the procuring entity to take advantage of solutions to its procurement needs that might be superior to the solution set forth in the procurement documents. Therefore, the model law should contain appropriate provisions dealing specifically with alternative tenders.

159. Paragraph (5) dealt with alternative tenders that had been expressly solicited in the procurement documents. In favour of retaining the paragraph, it was stated that without such a provision it might be uncertain in some legal systems whether or not alternative tenders could be solicited. The prevailing view was that, since those tenders were not per se unresponsive and should be treated as any other tender, the paragraph was not needed and should be deleted.

160. Paragraph (6) dealt with alternative tenders that had not been solicited by the procuring entity. The current text of the model law contained two alternative versions of the paragraph, designated as alternative 1 and alternative 2. Under alternative 1, an unsolicited alternative tender could be considered only if it was submitted by the contractor or supplier that had submitted the lowest or most economically advantageous responsive tender. That alternative was found by the Working Group to be unacceptable, because even though a contractor or supplier had submitted the most advantageous responsive tender its alternative tender might not be the most advantageous of the alternative tenders that had been submitted.

161. Alternative 2 of paragraph (6) enabled the procuring entity to consider an alternative tender even if the contractor or supplier had not also submitted a responsive tender; however, it required that an opportunity be given to the other contractors and suppliers that had submitted responsive tenders to submit altered or new tenders based on the alternative tender. That approach was found to be generally preferable to the approach in alternative 1 of paragraph (6).

162. It was recognized, however, that alternative 2 of paragraph (6) contained certain disadvantageous features. For example, the ability of other contractors and suppliers to submit altered or new tenders based upon an alternative tender was said to be cumbersome and time-consuming, particularly where several alternative tenders had been submitted. In addition, it was said that to reveal an alternative tender to other contractors and suppliers could violate intellectual property rights or rights of confidentiality of the contractor or supplier that had submitted the alternative tender. In the light of those disadvantages, a suggestion was made that paragraph (6) be deleted altogether. That suggestion was further supported by an opinion that retention of paragraph (6) would be inconsistent with the previous decision to delete paragraph (5).

163. Various suggestions were made as to how alternative 2 should be treated, if it were to be retained in some form. According to one suggestion, alternative 2 should be altered so as to provide that the procuring entity might consider any alternative tender submitted by a contractor or supplier that had also submitted a responsive tender. Another suggestion was that alternative 2 be merged with paragraph (5) by providing, in essence, that the procuring entity might consider any alternative tender, whether solicited or unsolicited, together with the responsive tenders.

164. In the light of the various views that had been expressed and, in particular, in the light of the view that alternative tenders should be dealt with in the context of article 31 (see paragraph 158, above), the Working Group deferred its decision concerning paragraph (6) until after its consideration of article 31. After it had considered article 31, the Working Group agreed that alternative tenders be encompassed within the situations covered by article 31, and that paragraph (6) of article 28 be deleted. It was also agreed that, if the procurement entity wished to be able to consider alternative tenders, the procurement documents should so specify and should indicate how those tenders would be considered.

Paragraph (7)

165. It was agreed that all criteria that were to be used in evaluating and comparing tenders should be set forth in the procurement documents. A number of delegations were of the view that the weightings to be given to those criteria should also be set forth.

166. It was observed that the term "most advantageous tender" was used in subparagraph (a) and in various other places throughout the text of the model law. The view was expressed that, although the term was defined in subparagraph (c), it could be misinterpreted in such a way as to imply that the procuring entity had considerably more discretion in evaluating tenders than was intended. That danger was particularly acute in connection with provisions containing the term that were located in the text of the model law some distance away from the definition. It was therefore agreed that the term be replaced with another term that was less susceptible to misinterpretation.

167. The Working Group doubted the utility of subparagraph (b) in the context of the model law. A suggestion was made that the subparagraph be relocated to the article setting forth the underlying policies or objectives of the model law (currently article 3).

168. The Working Group decided to delete the last clause of subparagraph (c)(ii) ("in so far as such critieria are not the subjects of required characteristics of the goods or construction or required contractual terms or conditions set forth in the procurement documents"), which was found to be confusing and of doubtful utility.

169. With respect to subparagraph (d), it was generally agreed that the procuring entity should be able to take into account socio-economic criteria in evaluating tenders. Although a view was expressed that socio-economic goals should not be achieved by discriminating against foreign contractors and suppliers, it was generally agreed that favourable treatment for local contractors and suppliers was often necessary, in particular in countries that sought to raise their levels of economic and technological development. It was noted that such treatment was provided for in the GATT Agreement on Government Procurement, with which the model law should be consistent. It was also agreed, however, that the ability of the procuring entity to take socio-economic criteria into account should not be completely unfettered. Rather, some standards should be set forth in the model law as to the nature of the criteria that could be taken into account. Moreover, the criteria that were to be used in evaluating tenders should be set forth in the procurement documents.

170. According to one view, only objective and quantifiable criteria should be taken into account. In that connection, it was suggested that subparagraphs (b) through (d) be simplified by providing merely that tenders should be evaluated on the basis of objective and quantifiable criteria set forth in the procurement documents.

171. According to another view, however, the procuring entity should not be restricted to using only objective and quantifiable socio-economic criteria. It was noted that many socio-economic factors were not susceptible to mathematical or other precise quantification. For the model law to be acceptable to States of all levels of economic and technological development, a procuring entity must be permitted to take those criteria into account. According to that view, subparagraph (d) should be retained; however, the criteria currently contained in the paragraph should be set forth in somewhat more concrete terms.

172. The Working Group regarded the foregoing exchange of views as only a preliminary discussion of the issues that had been raised. The Secretariat was requested to prepare for the next draft of the model law a reformulation of subparagraph (d), taking into account the views that had been expressed. In connection with that reformulation, the opinion was expressed that the phrase "to the extent possible", used in the current version of the paragraph, might offer a means of bridging the gap between the view that only objective and quantifiable criteria could be taken into account and the view that it should be possible to consider criteria that were not objective or quantifiable.

173. With respect to subparagraph (e), it was generally agreed that the model law and the procurement documents should make it clear whether the margin of preference was to be applied in addition to or instead of applicable customs duties. The decision of the Working Group with respect to paragraph 23 of the commentary to article 28 is reflected in paragraph 193, below.

Paragraph (8)

174. The Working Group found paragraph 8 to be satisfactory, subject to some drafting suggestions. In particular, it was suggested that a cross-reference be added to article 18(q) in order to make it clear that tenders were to be converted to a single currency in the manner described in that provision. It was also suggested that it be made clear that all tender prices were to be converted to the same currency.

Paragraph (9)

175. Paragraph (9) was found to be satisfactory.

Paragraph (10)

176. The Working Group agreed that paragraph 10 be deleted on the ground that the question of approval of acts and decisions taken by the procuring entity was an internal matter of the Government or administration that could be dealt with in the implementing regulations adopted by the enacting State. A suggestion was made that the need for approval be restricted to cases where the value of the goods or construction to be procured exceeded a specified threshold amount. An advantage of setting approval requirements in the implementing regulations was said to be greater flexibility in the event the enacting State wished to modify the requirements (e.g., a change in the

threshhold amount above which approval was required). It was pointed out that in some States acts and decisions of the procuring entity were not subject to approval. The Working Group agreed that when acts or decisions taken by the procuring entity were subject to approval the procurement documents should so indicate.

Article 29
Rejection of all tenders

177. It was agreed that paragraph (1) be redrafted so as to improve its clarity. One proposal for doing so was that the necessity for cross-references be removed by stating that the procuring entity might reject all tenders for any purpose other than to engage in competitive negotiations or for any fraudulent purpose. A proposal was made that article 29 specify that the procuring entity could reject all tenders only if it reserved the right to do so in the procurement documents.

178. The Working Group considered whether the procuring entity should be able to reject all tenders until the procurement contract entered into force, as was currently provided in paragraph (1), or until a tender had been accepted. In that connection, it was observed that, under its current formulation, article 32 provided two possibilities with respect to the acceptance of a tender and the entry into force of the procurement contract. Under article 32(2), the contract would enter into force at the same time that the tender was accepted. Under article 32(3), the contract would not enter into force until a written contract was signed, which would be after the tender had been accepted. The question as to the latest time when all tenders could be rejected therefore had practical relevance only in the case envisaged by article 32(3).

179. The prevailing view was that the procuring entity should be able to reject all tenders only until a tender had been accepted. In support of that view, it was stated that, even if acceptance of a tender did not result in the entry into force of a procurement contract, under article 32 it would give rise to certain mutual rights and obligations on the part of the procuring entity and the contractor or supplier whose tender had been accepted. Allowing the procuring entity to reject a tender that had been accepted would interfere with those rights and obligations and would disrupt the balance in them. In addition, it was said to be illogical to reject a tender that had already been accepted.

180. In support of enabling the procuring entity to reject all tenders until the entry into force of the procurement contract, it was stated that events could occur making it necessary for the procuring entity to be able to reject all tenders and terminate the proceedings during the time gap between acceptance of a tender and entry into force of the contract.

181. It was agreed that paragraph (2) be modified so as to provide that the procuring entity must, upon request, give the reasons for rejection of all tenders, but that it did not have to justify those reasons.

Article 30
Negotiations with contractors and suppliers

182. The Working Group agreed that paragraph (1)(a) be deleted in consequence of its decision, taken in connection with article 18(j), that establishing maximum or minimum tender prices or a range of prices within which tenders must fall was an undesirable practice that should not be referred to in the model law (see paragraph 89, above). It was observed that, where all tenders substantially exceeded an estimated tender price, a problem in the specifications might have been the cause (e.g., the specifications might have called for excessively costly materials or construction methods). It was agreed that, in such a case, the procuring entity could exercise its right to reject all tenders and should be able either to modify the specifications and re-institute tendering proceedings, or to engage in negotiations with the contractor or supplier that had submitted the lowest or most economically advantageous tender. However, those possibilities could be provided for elsewhere in the model procurement law (e.g., article 7).

183. The Working Group also agreed that paragraph (1)(b) be deleted, on the ground that the case envisaged (that no one tender was obviously the lowest or the most economically advantageous tender) was unlikely to occur in practice. In addition, the provision was said to be subject to abuse. It was also agreed that paragraph (2) be deleted, in the light of the decision of the Working Group to delete similar wording from article 28(7)(c)(ii) (see paragraph 168, above).

184. After having decided to delete paragraphs (1) and (2), the Working Group considered whether to retain the chapeau of article 30. General agreement was expressed with the principle set forth in the chapeau that, in the context of formal tendering proceedings, no negotiations should take place between the procuring entity and contractors or suppliers. According to one view, because of the importance of that principle, it would be useful to retain it in a separate article of the model law, with some drafting changes. The prevailing view, however, was that the principle should be located elsewhere in the model law. Accordingly, article 30 was deleted in its entirety.

Article 31
Special tendering procedures for solicitation of proposals

185. The Working Group found the procedures provided for in article 31 to be generally acceptable, subject to various improvements. It was observed that the procedures were intended to be used where tendering proceedings could not be conducted on the basis of detailed specifications and other requirements (e.g., where the procuring entity sought to procure technologically advanced equipment for which precise specifications could not be formulated) and where it was not desirable for the procurement to be engaged in by competitive negotiations or by single-source procurement. It was noted that there existed in national legal systems numerous variations on and alternatives to the model presented in article 31. It was recognized, however, that a uniform law on procurement could not attempt to encompass all of those variations and alternatives; rather it should provide clearly differentiated sets of procedures that were suitable for procurement in various types of situations. It was suggested that it would be useful for the commentary to mention that other variations and alternatives to the procedures provided for in article 31 were used in various countries.

186. It was observed that the procedures provided in article 31 were broadly similar to a method of procurement often referred to in international practice as "two-stage tendering". They differed, however, from another method of procurement, often referred to as "requests for proposals". In the latter method, the procuring entity set forth the broad parameters of its procurement needs, requested proposals from a relatively small number of contractors and suppliers and negotiated with contractors and suppliers submitting the proposals to arrive at the most suitable proposal. Price was in many cases included within the scope of the negotiations. It was agreed that the title of the article be changed to "two-stage tendering proceedings" in order to reflect the subject-matter of the article and to avoid confusion as to the essential nature of the procedures provided.

187. A number of delegations were of the view that, in addition to procedures provided in article 31, the model law should provide for requests for proposals or, at least, should not prohibit that method of procurement. According to a contrary view, however, that method was used for the procurement of services such as consultant services but was not used for the procurement of goods or construction; accordingly, the method should not be provided for in the model law, which did not at the current stage apply to services.

188. In connection with paragraph (1), it was agreed that the situations in which the procedures provided by the article could be used should be expanded, so as not to be restricted to cases where the procuring entity sought proposals with respect to the technical characteristics of the goods or construction. For example, the procedures should be able to be used when the procuring entity sought proposals with respect to contractual terms and conditions (e.g., payment conditions).

189. The Working Group found that, despite paragraph (2) and despite the placement of article 31 within the section of the model law dealing with tendering proceedings, it was not sufficiently clear that the various aspects of the procedures (e.g., the evaluation criteria; the opening, examination, evaluation and comparison of the tenders containing the proposals) were to be governed by the rules of the model law relating to tendering proceedings, except in so far as those rules were derogated from in article 31. It was agreed that greater clarity in that respect should be achieved, perhaps by including in article 31 cross-references to key articles relating to tendering proceedings, such as article 28.

190. It was noted that one rule applicable to tendering proceedings, including the procedures provided by article 31, was that the criteria for evaluating the proposals must be set forth in the procurement documents. It was stated, however, that certain criteria might depend on characteristics of the proposals resulting from the discussions provided for in paragraph (4). Thus, it was suggested that the procuring entity be able to change the criteria or add new ones after receiving the proposals.

191. It was agreed that paragraph (4) should make it clear that the reference to "discussions" encompassed negotiations. It was also agreed that the words, "other than a required characteristic of the goods or construction or a required contractual term or condition set forth in the procurement documents", be deleted in view of prior decisions to delete similar wording that appeared elsewhere in the model law (see paragraphs 168 and 183, above).

192. It was agreed that wording be added to paragraph (5) to the effect that the procuring entity could modify the specifications, if necessary. A proposal was made that the reference to a tender security be deleted, since it should not be necessary for contractors and suppliers to submit tender securities with their initial proposals.

193. It was agreed that paragraph 23 of the commentary to article 28 be deleted, since the "two-envelope system" served no useful purpose and was less efficient than the usual method of submitting and opening the technical component and the price component of tenders as a single unit.

Article 32
Acceptance of tender and entry into force of procurement contract

194. Pursuant to its previous decision that the requirement of approval of acts and decisions of the procuring entity be dealt with in the implementing regulations and not in the model law (see paragraph 176, above), the Working Group decided to delete the words "subject to approval" from paragraphs (1) and (4).

195. A view was expressed that, in paragraphs (2) and (3), reference should be made to the "receipt" of the notice of acceptance of the tender, rather than to its dispatch. The prevailing view, however, was that the reference should be to the "dispatch" of the notice. Accordingly, alternative 1 of paragraph (6)(b) was adopted.

196. An opinion was expressed that, as currently drafted, paragraphs (2) and (3)(b) appeared to be inconsistent with each other, in that paragraph (2) provided that the procurement contract entered into force when the notice of acceptance of the tender was given and paragraph (3)(b) provided that the contract entered into force when a written contract document was signed. It was agreed that the apparent inconsistency should be eliminated by clarifying that paragraphs (2) and (3) provided two alternative possibilities with respect to the time when the contract entered into force; namely, paragraph (3)(b) applied only when a written contract document had to be signed, while paragraph (2) applied in all other cases. A proposal was made that paragraph (3)(a) be redrafted so as to clarify that the signature of a written contract document was necessary only when required by the notice of acceptance of the tender. However, a further proposal was made that a requirement be added to paragraph (3)(a) to the effect that a written contract document must be signed when required by other mandatory legal rules of the law applicable to the formation of the contract.

197. After that discussion, the Working Group addressed the specific question of the time when the procurement contract should be regarded as having entered into force. One view was that the approach in paragraph (2) should be followed in all cases, rather than the approach in paragraph (3). In support of that view, it was said that the approach in paragraph (2) was followed in many areas of the world. The approach in paragraph (3) was said to give rise to questions as to the rights and obligations of the parties during the interval between the time when the notice of acceptance of the tender was dispatched and the time when the contract document was signed. In addition, the approach was said to present the danger of disruption of the procurement during the interval, e.g., by a failure of the contractor or supplier to sign the contract document, as well as an opportunity for improper practices by a party during the interval.

198. Another view was that the approach in paragraph (3) should be followed in all cases, and that paragraph (2) should be deleted. Paragraph (3) was said to represent the practice in some countries. It was noted that tenders might be modified one or more times and that, if the contract were to enter into force upon dispatch of the notice of acceptance of the tender, it might be uncertain what the terms of the accepted tender were. Providing that the contract entered into force only upon the signature of a written contract document would eliminate that uncertainty.

199. According to yet another view, the question of when the contract entered into force should be resolved by rules, other than the model law, of the law applicable to the formation of the contract. In support of that approach, it was stated that some legal systems contained mandatory legal rules with respect to the entry into force of contracts, with which the model law should not interfere (e.g., rules requiring certain types of contracts, such as those involving a transfer of technology, to be in writing or to be approved by a particular governmental authority). It was pointed out, however, that the model law set forth rules and procedures that were designed to meet the particular needs of public procurement, and that a reference to other rules of the law applicable to the formation of the contract might result in the application of inconsistent rules and procedures. In addition, it was observed that the suggested approach would not contribute to uniformity of law.

200. A further view was that both paragraphs (2) and (3) should be retained, subject to certain clarifications and drafting improvements. It was pointed out that some legal systems countenanced both of the approaches reflected in those paragraphs.

201. It was generally agreed that, whichever approach was followed, the procurement documents should clearly indicate the formalities that would be required in order for the procurement contract to enter into force, and that a requirement to that effect should be added to article 18(f).

202. Concerning the case where the procurement contract did not enter into force until a written contract document had been signed, it was generally agreed that paragraph (3)(b) did not adequately elaborate the rights and obligations of the parties during the interval between the time of dispatch of the notice of acceptance of the tender and the time of signature of the contract document. It was generally agreed that those rights and obligations should be mutual and balanced and that paragraph (3)(b) as currently drafted was deficient in that respect. A suggestion was made, for example, that the paragraph specifically obligate the procuring entity and the contractor or supplier whose tender had been accepted to sign the contract document. In response, however, it was stated that the model law already provided mutual and balanced obligations in respect of the interval; namely, a tender could not be withdrawn after the deadline for the submission of tenders and had to remain in force during the time specified in the procurement documents (article 25), and the contractor or supplier whose tender had been accepted was obligated to enter into a procurement contract or forfeit its tender security; the procuring entity, for its part, could not reject all tenders after a tender had been accepted (article 29) and was obligated by virtue of its acceptance of a tender to sign the contract document.

203. According to another view, various additional rights and obligations of a quasi-contractual nature accrued to the parties during the interval as a result of the acceptance of a tender, and paragraph (3)(b) should elaborate

those rights and obligations more fully. A contrary view was that the only obligation of the parties was to sign a written contract conforming to the terms and conditions of the tender that had been accepted.

204. A view was expressed that article 32 should deal with the question of the remedies that would be available to one party if the other party violated an obligation incumbent upon it as a result of the acceptance of the tender. A suggestion was made, for example, that the article specify whether the procuring entity would be entitled to damages in addition to claiming under the tender security where the contractor or supplier failed to sign a written contract document. One suggestion was that the question be dealt with in the portion of the model law dealing with redress. Another view, however, was that the approaches to the question in national legal systems varied widely, and that it would be difficult to deal with it in the model law. According to that view, the question should be left to be resolved by rules of national law other than the model law, but the various approaches under national law might be mentioned in the commentary.

205. With respect to paragraph (4), the view was expressed that, if the contractor or supplier whose tender had been accepted failed to sign the written contract document or to provide a performance security, the procuring entity should be required to accept the next most advantageous tender; the procuring entity should not merely be permitted to do so, as appeared to be the case under paragraph (4) as currently formulated. The suggested approach was said to be consistent with the disciplined nature of formal competitive tendering. The approach was also said to be consistent with article 7(2)(b)(ii), which provided that the procuring entity would not be entitled to engage in competitive negotiations in the event of such a failure by the contractor or supplier if there remained in effect other responsive tenders from qualified contractors and suppliers. According to another view, however, paragraph (4) should be retained in its current form.

206. The Working Group requested the Secretariat to prepare for the next session of the Working Group a new text for article 32, taking into account the discussions at the current session and, in particular, to include a provision elaborating the rights and obligations of the parties during the interval between acceptance of a tender and signature of a written contract document.

Article 33
Minutes of tendering proceedings

207. It was generally agreed that the reference to "minutes of tendering proceedings" in the title and text of the current article, in the text of article 31(6), and elsewhere in the model law, be changed to "record of tendering proceedings".

208. It was generally understood by the Working Group that, in cases when all tenders had been rejected by the procuring entity pursuant to article 29, paragraph (1) required only that the record of the tendering proceedings contain a statement to that effect; in accordance with the decision taken by the Working Group during its discussion of article 29, the reasons for the rejection need be given only upon request (see paragraph 181, above).

209. A view was expressed that the expression "made available for inspection",

which appeared in paragraph (2), should be clarified. According to one view, the record should be made available only to participants in the tendering proceedings. The prevailing view, however, was that the record should be made available to any person, an approach that would promote honesty and confidence in the procurement process.

210. It was generally agreed that the scope of confidentiality provided in paragraph (2) be expanded by providing that information should not be disclosed if disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. In opposition, it was stated that, under the foregoing formulation, an implementing State could severely restrict the scope of disclosure by adopting laws making various aspects of procurement proceedings confidential.

211. It was generally agreed that information relating to the examination, evaluation and comparison of tenders should not be disclosed. It was stated that tender prices should not be disclosed either, since to disclose tender prices could facilitate the formation of price cartels.

212. A proposal was made that paragraph (2) be reformulated so as to require the record of the tendering proceedings to be made available prior to the entry into force of the procurement contract and not, as currently provided in the paragraph, after the contract had entered into force and the contractor or supplier had supplied a performance security. That change would facilitate the institution of proceedings for redress by an aggrieved contractor or supplier prior to the entry into force of the contract. The ability to institute proceedings prior to the entry into force of the contract would avoid the disruptive effects on the performance of the contract that would result if proceedings were to be instituted after the contract had entered into force.

Article 34
Competitive negotiation proceedings

213. A proposal was made that article 34 be deleted. In support of the proposal, it was stated that the provisions of article 7(2), which specified the circumstances in which competitive negotiation proceedings could be used, could be abused by procuring entities seeking improperly to avoid having to engage in tendering proceedings, and could result in higher prices than would be obtained if tendering proceedings were to be engaged in. There was also said to be no need for competitive negotiations in the cases referred to in article 7(2). Those were cases in which, in essence, tendering proceedings had not resulted in a procurement contract. It was said that, in such cases, the procuring entity should modify the specifications or other aspects of the procurement documents, if necessary, and engage in new tendering proceedings. Furthermore, it was said that no safeguards against abusive practices in the competitive negotiations were provided in the model law.

214. The proposal to delete article 34 was not accepted. The Working Group was in general agreement that a procuring entity should be able to engage in competitive negotiation proceedings in certain circumstances and that the model law should provide for that method of procurement. It was also agreed, however, that article 7(2) in its current formulation was too broad, and that

the use of competitive negotiation proceedings should be permitted only in very limited circumstances. Suggestions as to those circumstances included cases where tendering proceedings had failed completely and where engaging in further tendering proceedings would be unlikely to result in a procurement contract; where the goods or construction to be procured were of a low value; where the goods or construction were highly specialized or involved highly specialized technology; or where there was an urgent need for the goods or construction, making the use of tendering proceedings impossible or inadvisable.

215. It was suggested that the text of the model law be reviewed to ensure consistency among the various provisions dealing with the steps to be taken when all tenders had been rejected pursuant to article 28 and article 29.

216. It was agreed that the words in paragraph (1), "but in any case with at least [3] contractors and suppliers unless negotiations with [3] contractors and suppliers are not possible or are not practicable", be deleted.

217. In connection with paragraph (2), the view was expressed that the exception to the requirement that any information relative to the negotiations must be communicated on an equal basis to all contractors and suppliers (namely, that the requirement did not apply to information particular to negotiations with a particular contractor or supplier or to confidential information) was contrary to the principle of equal treatment of all contractors and suppliers. It was also said that the exception could be abused by a procuring entity, and that the circumstances in which the exception was intended to apply were adequately covered by paragraph (3). Accordingly, it was agreed that the exception be deleted from paragraph (2).

218. It was understood that the discussion and decisions of the Working Group with respect to article 33 applied also to paragraph (4) of article 34.

Article 35
Record of single source procurement

219. The content of article 35 was found to be generally acceptable. A view was expressed that it might be useful for the model law or the commentary to explain what was meant by single source procurement. It was suggested that the circumstances in which single source procurement could be used, which were set forth in article 7(3), be examined to ensure that no inconsistency would arise from the changes to be made to article 7(2).

220. It was understood that the discussion and decisions of the Working Group with respect to articles 33 and 34(4) applied also to article 35. It was observed that, under article 35, a procuring entity seemed to be required to prepare a record of all purchases made by it, and it was questioned whether such an approach was desirable.

221. In addition to its discussion with respect to requests for proposals (paragraphs 186 and 187, above), a suggestion was made that the model law deal with a method of procurement referred to as "shopping". Under that method the procuring entity obtained price quotations for goods from suppliers. According to the suggestion, the circumstances in which that method could be used (e.g., for the procurement of standardized finished goods) should be indicated.

III. FUTURE WORK AND OTHER BUSINESS

222. For the next session of the Working Group, the Secretariat was requested to prepare draft provisions of the model law dealing with redress for actions and decisions contrary to the model law, and to revise the text of the model law to take into account the discussions and decisions at the current session. It was understood that the revision need not attempt to perfect the structure or drafting of the text, since those matters would be dealt with once the substance of the text had been settled. It was also agreed that the commentary would not be revised until after the substance of the text of the model law had been settled, and that no revision of the commentary would be prepared for the next session of the Working Group.

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INTERNATIONAL COUNTERTRADE

Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters

Report of the Secretary-General

1. The Commission, at its nineteenth session (1986), in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered its future work on the topic of countertrade. There was considerable support in the Commision for undertaking work on the topic, and the Secretariat was requested to prepare a preliminary study on the subject. 1/

2. At its twenty-first session (1988), the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for the Commission to decide what further action might be taken, the Commission requested the Secretariat to prepare for the twenty-second session of the Commission a draft outline of such a legal guide. 2/

3. At its twenty-second session (1989), the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. 3/

1/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

2/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 32-35.

3/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 245-249.

4. Addenda 1 to 7 to the present document contain an outline of chapter I and sample draft chapters II to VI, IX and XII of the draft legal guide. During the preparation of the draft chapters, including preliminary drafts of chapters that are not contained in addenda to this report, the Secretariat found it desirable to modify the titles, structure and the sequential order of certain chapters, as the chapters were originally set out in document A/CN.9/322 ("Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts").

5. In preparing the draft chapters the Secretariat has taken into account a broad range of relevant documents, contracts, books and articles. In addition, the Secretariat has benefitted from the comments of an expert group which met at Vienna from 12 to 15 December 1989.

6. The proposed revised structure of the legal guide is as follows:

I. INTRODUCTION TO LEGAL GUIDE. An outline of the chapter is contained in addendum 1 to the present report.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE. The draft chapter is contained in addendum 1 to the present report.

III. CONTRACTING APPROACH. The draft chapter is contained in addendum 2 to the present report.

IV. GENERAL REMARKS ON DRAFTING. The draft chapter is contained in addendum 3 to the present report.

V. TYPE, QUALITY AND QUANTITY OF GOODS. The draft chapter is contained in addendum 4 to the present report.

VI. PRICING OF GOODS. The draft chapter is contained in addendum 5 to the present report.

VII. FULFILMENT OF COUNTERTRADE COMMITMENT. The Secretariat intends to deal in the draft chapter with the time period for fulfilment of the countertrade commitment (length, commencement and extension of the fulfilment period) and with the division of the fulfilment period into subperiods. Furthermore, it is intended to address contractual mechanisms for monitoring and recording fulfilment of the countertrade commitment.

VIII. PARTICIPATION OF THIRD PERSONS. The Secretariat intends to deal in this chapter with issues to be addressed in the countertrade agreement if it is envisaged that a third person may be engaged to purchase goods required to be purchased in order to fulfil the countertrade commitment. The chapter would also address the contractual relationship between the party committed to purchase goods and the third person, and the relationship between the third person and the supplier of the goods. In addition, the chapter would discuss cases in which a third person is engaged to supply goods within the framework of the countertrade agreement.

IX. PAYMENT. The draft chapter is contained in addendum 6 to the present report.

X. RESTRICTIONS ON RESALE OF GOODS. The Secretariat intends that the legal guide discuss possible clauses in the countertrade agreement concerning various types of territorial restrictions on the resale of goods purchased in a countertrade transaction as well as restrictions concerning terms of resale.

XI. LIQUIDATED DAMAGES AND PENALTIES. This chapter would discuss various issues related to the use of liquidated damages or penalty clauses to support the countertrade commitment. These issues include the parties that may be made subject to such a clause, the effect of payment of the agreed sum, the amount of the agreed sum and obtaining the agreed sum.

XII. SECURITY FOR PERFORMANCE. The draft chapter is contained in addendum 7 to the present report.

XIII. INTERDEPENDENCE OF OBLIGATIONS. It is intended that this chapter will discuss the extent to which a difficulty occurring in one segment of the transaction may have an effect on the other segment of the transaction.

XIV. CHOICE OF LAW.

XV. SETTLEMENT OF DISPUTES. The methods of settling disputes to be dealt with in the legal guide include negotiation, conciliation, arbitration and judicial proceedings. The legal guide would also address co-ordination between the dispute settlement clauses in the discrete contracts involved in a countertrade transaction. In addition the legal guide would discuss clauses to be used when more than two parties involved in a countertrade transaction wish to be joined in one dispute settlement proceeding.

7. The Commission may wish to note that the proposed time-table for the Commission's session, as set out in the provisional agenda (A/CN.9/327), provides that the first five days of the session would be devoted to a discussion of the subject of countertrade. It is suggested that the Commission use this period for an in-depth discussion of the draft legal guide. The Commission may wish to discuss the structure of the legal guide, as set out above in paragraph 6, and take up chapters I to VI, IX and XII (addenda 1-7 to the present report). The Commision may wish to consider the concept of the chapters, whether they cover the relevant issues, whether the statements made appropriately take into account the needs of countertrade practice and whether advice given is appropriate.

8. The Commission may wish to consider, on the basis of its discussion of the draft chapters and of the schedule of meetings of the Commission and its Working Groups during the remainder of 1990 and in 1991, the future procedure that should be followed in the preparation of the legal guide.

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Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters*

Report of the Secretary-General

Addendum

I. INTRODUCTION TO LEGAL GUIDE

[The legal guide would have an introductory chapter describing the origin, purpose, approach and structure of the guide. It is suggested that it should be the last chapter to be drafted. At that time the structure of the legal guide would be clear including such issues as which chapters it would have, whether each chapter would be preceded by a chapter summary, and whether the guide would in some instances set forth illustrative contract provisions.]

In preparing the chapters the secretariat has, where appropriate, included suggestions as to how certain issues in a countertrade transaction might be settled. Three levels of suggestion have been used. The highest level is indicated by expressions to the effect that the parties "should" take a particular course of action. It is used only when that course of action is a logical or legal necessity. This level is used sparingly in the legal guide. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. Formulations such as "the parties may wish to consider" or

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"the parties might wish to provide", or the contract "might" contain a particular solution, are used for the lowest level of suggestion. The wording used for a particular suggestion may be, for drafting reasons, varied somewhat from that just indicated; however, it should be clear from the wording what level of suggestion is intended.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE

Contents

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A. Transactions covered

1. Countertrade transactions dealt with in the legal guide are those international contractual arrangements under which one party supplies goods, services or technology to the second party, and, in return, the first party purchases or procures the purchase of an agreed amount of goods, services or technology from the second party, or from a party designated by the second party. (For the sake of simplicity, the legal guide will refer only to "goods" as the subject-matter of countertrade transactions, although the subject-matter of a given transaction may include services or technology.) A distinctive feature of these transactions is the existence of a link between the supply of goods in the two directions in that the conclusion of the contract or contracts for the supply of goods in one direction is conditioned upon the conclusion of the contract or contracts for the supply in the other direction. When the parties enter into contracts in opposite directions without expressing such a link between them, the contracts, as regards contractual rights and obligations of the parties, cannot be distinguished from straightforward independent transactions. Therefore, the legal guide deals only with transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction.

2. Beyond this basic definition, countertrade transactions display a number of differing features. The differences concern such matters as the contractual structure of the transaction, the time sequence of conclusion of the component contracts, the underlying commercial interests of the parties, and other commercial and technical characteristics of the transactions. The legal guide takes into account that countertrade transactions display these differing features and that these features will affect the drawing up of the various contracts.

3. A countertrade transaction may be contractually structured in different ways. Often, the supply of goods in each direction is covered by a distinct contract. In such a case the link between these segments arising from the fact that the conclusion of the contract in one direction is conditioned upon the conclusion of the contract in the other direction may be expressed in an agreement separate from those contracts. In other cases that link may be expressed in a contract clause that is integrated into one of those contracts. In yet other cases, the whole transaction, i.e. the reciprocal supplying of goods and the stipulation expressing the link between the segments of the transaction, is incorporated into one contract (e.g., a barter contract). The legal guide discusses the implications of the choice of a particular contract structure or the choice of a particular contract form (see chapter III, "Contracting approach").

4. Furthermore, the contracts for the supply of goods in the two directions may be concluded at different points of time or they may be concluded simultaneously. When they are concluded at different points of time, which is often the case, the parties conclude an agreement expressing a commitment to conclude the future contract or contracts for the supply of goods. Such an agreement may be entered into together with the conclusion of the initial contract for the supply of goods in one direction or it may be entered into prior to the conclusion of any supply contract. When the parties agree simultaneously on the supplies in both directions, the agreement between the parties would not include a commitment to conclude future contracts, but would establish a relationship between the performances due from each party. The legal guide refers to the particular sequence of the conclusion of the supply contracts when this is required by the context of the discussion.

5. Another aspect of the variety of countertrade transactions is the degree of interest the parties may have in the different segments of a countertrade transaction. In some transactions one of the parties is interested only in the export of its goods and would prefer to be free to decide whether to import goods from the other party. In other transactions, the parties consider the supply of goods in the two directions as being in their mutual interest. There are also transactions in which, at the outset of the transaction, a party perceives a commitment to conclude future contracts as a concession to the other party, but subsequently comes to regard that commitment as a benefit. The legal guide takes into account such possible differing degrees of interest that the parties may have in the different parts of the countertrade transaction and the impact that such differing degrees of interest may have on the contract or contracts.

6. Furthermore, a broad distinction among countertrade transactions may be made depending on whether the goods supplied in one direction are used in the production of the goods to be supplied in the other direction or whether no such technological link exists between the reciprocal deliveries. The legal guide will cover both of those varieties of countertrade and will make reference to a particular variety whenever appropriate.

7. A further distinction may be made on the basis of the number of the parties involved in a transaction. In some cases, the reciprocal deliveries of goods under the transaction are carried out between the same two parties. In other cases, on one side of the transaction, or on both, the roles of the seller and of the buyer are assumed by different persons. The legal guide addresses the contractual issues that are raised by the involvement of more than one party on either or both sides of a transaction.

B. Terminology

8. Terminology used in practice and in writings to describe countertrade transactions and the parties involved in them varies greatly. A prevailing terminology has not developed. The following paragraphs establish a terminology used in the legal guide for different varieties of countertrade transactions, parties and contracts in countertrade.

1. Varieties of countertrade

9. The discussion in the legal guide is relevant to different commercial types of countertrade. In most instances, the contractual issues addressed in the legal guide are the same for all commercial types of countertrade transactions, and the discussion in the legal guide generally does not distinguish among types of countertrade. However, in some contexts the discussion is particularly relevant to a commercial type of countertrade. Therefore, the terms used to denote such types of countertrade are explained below. The criteria used to distinguish the types of countertrade are based on commercial, technical and legal aspects of the transaction.

10. Barter. In practice the term "barter" is used with different meanings. The term may refer, for example, to countertrade transactions in general, to an intergovernmental agreement addressing mutual trade in particular goods between identified partners, or to countertrade in which trans-border flow of currency is eliminated or reduced or where a single contract governs the mutual shipments of goods. The legal guide uses "barter" in a strict legal sense to refer to a contract involving a two-way exchange of specified goods in which the supply of goods in one direction replaces, entirely or partly, the monetary payment for the supply of goods in the other direction. Where there is a difference in value in the supply of goods in the two directions, the settlement of the difference may be in money or in other economic value.

11. Counter-purchase. This term is used to refer to a transaction in which the parties, in connection with the conclusion of a purchase contract in one direction, enter into an agreement to conclude a sales contract in the other direction, i.e. a counter-purchase contract. Counter-purchase is distinguished from buy-back in that the goods supplied under the first purchase are not used in the production of the items sold in return.

12. Buy-back. This term refers to a transaction in which one party supplies a production facility, and the parties agree that the supplier of the facility, or a person designated by the supplier, will buy resultant products from the purchaser of the facility. The supplier of the facility often provides technology and training and sometimes component parts or materials to be used in the production.

13. Offset. Transactions referred to in the legal guide as offsets normally involve the supply of goods of high value or technological sophistication. Under a "direct offset" the contract for the supply of goods in one direction is combined with an agreement that the supplier will purchase from the other party component parts of, or products related to, those goods. Sometimes the supplier would also agree to provide technology or investment for the production by the other party of the component parts. Such direct offsets are also referred to as industrial participation or industrial

co-operation. The expression "indirect offset" typically refers to a transaction where a governmental agency that procures, or approves the procurement of, goods of high value requires from the supplier that counter-purchases are made in the procuring country or that economic value is provided to the procuring country in the form of investment, technology or assistance in third markets. The counter-export goods are not technologically related to the export goods (i.e., they are not components of the export goods, as in direct offset, and they are not resultant products of the facility provided under the export contract, as in buy-back). The governmental agency often stipulates guidelines for the offset, for example, as to the industrial sectors or regions that are to be assisted in such a way. However, within such guidelines, the party committed to counter-purchase or to providing such assistance is normally free to choose the contracting partners.

2. Parties to countertrade transaction

14. Exporter or counter-importer. The term "exporter" or "counter-importer" is used for the party who is - under the first contract to be concluded - the supplier, i.e. the exporter, of goods, and who has entered into a commitment with the other party to purchase, i.e. to counter-import, other goods in return. One or the other term is used depending on the context in which the party is mentioned. It should be noted that in some countertrade transactions the exporter and the counter-importer are the same party, while in others the exporter and counter-importer are different parties.

15. Importer or counter-exporter. The term "importer" or "counter-exporter" is used for the party who is - under the first contract to be concluded - the purchaser, i.e. the importer, of goods, and who has entered into a commitment with the other party to supply, i.e. to counter-export, other goods in return. One or the other term is used depending on the context in which the party is mentioned. As in respect of the exporter and the counter-importer, in some countertrade transactions the same party is the importer and the counter-exporter. Sometimes, however, one party imports and another party counter-exports.

16. In some writings the term "exporter" is used to denote the party from an economically developed country, who often supplies goods of technological content that normally cannot be obtained in the other party's country. The term is used irrespective of whether the "exporter" supplies first and agrees to purchase later or whether the "exporter" makes an "advance purchase" from the other party in order to enable that other party to raise funds needed for a subsequent purchase of goods from the "exporter". The term "importer" is used in those writings to denote the party from a developing country. To underline that meaning, such writings may use terms such as "primary" or "western exporter" or "developing country importer".

17. A distinction based on economic or regional considerations is not used in the present legal guide. One reason is that the guide covers both intra-regional and inter-regional countertrade. Thus, distinctions used in discussions of inter-regional countertrade, in which the issues tend to be considered primarily from the perspective of one of the parties, would not be suitable since the legal guide advises both parties whatever may be their relative economic strength or background. Furthermore, terms based on the time sequence of the conclusion of contracts are more suitable since, for the

purpose of discussing the contractual role and interests of parties, the question of primary significance is whether the party has already sold its goods and has promised to purchase goods from the other party, or whether the party, having purchased goods, has not sold its goods yet.

18. Purchaser, supplier or party. The legal guide frequently uses the term "purchaser", "supplier" or "party" to refer to parties purchasing and supplying goods in a countertrade transaction. When reference is made to a party who is committed to purchase or supply goods but has not yet done so, the legal guide may use the terms "party committed to purchase goods" and "party committed to supply goods". Such terminology is employed when the discussion in the legal guide is relevant to the contractual position of a party purchasing or supplying goods irrespective of whether the purchase or supply in one direction takes place before or after the purchase or supply in the other direction. The order in which the shipments take place would not affect the contractual position and risks of the parties when the parties commit themselves to conclude contracts for the supply of goods without stipulating the sequence in which those contracts are to be concluded. Such terminology also covers cases in which the contracts for the supply of goods in the two directions are concluded concurrently and in which the sequence of the contracts cannot serve as a terminological criterion.

3. Component contracts of a countertrade transaction

19. Countertrade agreement. The countertrade agreement is the basic agreement which sets forth several stipulations concerning the type of countertrade transaction being entered into and the manner in which it is to be implemented. In practice, the countertrade agreement is referred to by a variety of names, such as "frame agreement", "countertrade protocol", "letter of intent", "umbrella agreement", "memorandum of understanding", "letter of undertaking", or "counterpurchase agreement". The countertrade agreement usually contains the commitment of the parties to enter into the future contracts required to fulfil the objective of the transaction ("countertrade commitment", see para. 20 below). In addition to the countertrade commitment, the countertrade agreement is likely to contain other stipulations on issues such as the type, quality and quantity of the goods, price of the goods, time period of fulfilment of the countertrade commitment, payment, restriction on resale of goods, participation of third persons in the transaction, liquidated damages or penalties, security for performance, interdependence of obligations in the transaction, choice of law, and settlement of disputes. The countertrade agreement may be embodied in a discrete instrument or it may be included in a contract for the shipment of goods. When the parties agree simultaneously on the terms governing the supply of all the goods in both directions, the countertrade agreement would contain a stipulation expressing the link between the concluded contracts and possibly other stipulations, but would not contain a countertrade commitment.

20. Countertrade commitment. This term is used to refer to the commitment of the parties to enter into a future contract or contracts. Depending on the circumstances, those future contracts may relate only to the shipment in one direction or to the shipments in both directions. The degree to which the countertrade commitment is definite depends on the amount of detail contained in the countertrade agreement concerning the terms of the future contracts.

21. Export, import, counter-export, and counter-import contracts. The contracts for the supply of goods entered into by the parties would be referred to by names consistent with the names of the parties, i.e. "export" or "import" contract for the first contract entered into, and "counter-export" or "counter-import" contract for the contract entered into subsequently. The contracts in each direction may be referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction.

22. Supply contracts. In the cases mentioned above where no clear criterion exists for distinguishing between the exporter and the importer, or where the context requires a general reference to any party to the countertrade transaction, and in which the term "party" or "parties" to the countertrade transaction may be used, the contracts for the supply of goods between the parties may be referred to as "supply contracts".

23. Countertrade transaction. This term is used to refer to the whole countertrade arrangement containing the related supply contracts and any countertrade agreement.

C. Focus on issues specific to countertrade

24. The contracts for individual supplies of goods under a countertrade transaction generally resemble contracts concluded as discrete and independent transactions. In some cases, however, the content of a contract is affected by the fact that it forms part of a countertrade transaction. For example, when the proceeds of a contract in one direction are to be used to pay for the contract in the other direction, the two supply contracts may contain payment provisions particular to countertrade. Therefore, the guide does not deal with supply contracts except to the extent that they contain provisions typical of countertrade.

25. The questions specific to or of particular importance for international countertrade are concentrated in the countertrade agreement. The legal guide focuses on questions raised in drawing up the countertrade agreement. Where necessary, reference is made to drawing up a provision in a supply contract that is influenced by the fact that the contract is part of the countertrade transaction.

26. Some of the issues dealt with in the legal guide are essential in establishing a countertrade transaction. For example, the parties would have to choose a contracting approach, express in appropriate form their commitment to engage in reciprocal trade, and specify the extent of the commitment. Solutions to certain other questions dealt with in the legal guide, while not necessarily essential, would help to ensure proper implementation of the transaction. Such questions include: the time period for the fulfilment of the countertrade commitment, type, quality, quantity and price of the countertrade goods, payment mechanism, participation of a third person in the fulfilment of the countertrade commitment, restrictions on resale of countertrade goods, security for performance, liquidated damages and penalties, possible effect on the countertrade transaction of problems arising in an individual contract for the supply of goods, choice of law, and settlement of disputes. The parties intending to enter into a countertrade transaction are advised to address the essential questions. As to the other questions that are not necessarily essential but may be helpful in the

implementation of the transaction, the parties will have to judge whether and to what extent the contractual solutions discussed in the legal guide are relevant to the circumstances of the given case.

D. Governmental regulations

27. In some countries countertrade is subject to governmental regulations. Such regulations, which may derive from international agreements, are closely linked with national economic policies and as a result vary from country to country and are likely to be changed more often than rules of contract law. Governmental regulations may promote or restrict countertrade in a variety of ways. For example, it may be provided that certain types of imports must be paid for only through a countertrade arrangement, that state trading agencies are to explore the possibility of countertrade when negotiating certain types of contracts, that certain types of local products are prohibited from being offered in countertrade, or that foreign currency payments into the country must not be restricted. Other such rules may relate to exchange controls or to the authority of an administrative organ to approve a countertrade transaction. Some regulations may be specifically oriented to countertrade, while others may be more general, but with an impact on countertrade. Some regulations are directed to one contracting party only and do not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may limit the parties' freedom of contract.

28. The legal guide advises parties to take into account such governmental regulations. Since the regulations are disparate and are often changed, advice is given, where appropriate, in the form of a caveat rather than in any detailed discussion of the substance of the applicable regulations.

E. Universal scope of legal guide

29. The legal guide treats the legal issues arising from countertrade at the universal level, in view of the fact that the motives for engaging in countertrade, the interests of the parties involved, and the private law questions do not reveal regional particularities. To the extent there exist regional differences in contract practices, they concern in particular the frequency of use of certain commercial types of countertrade and the elaborateness and refinement of contractual solutions.

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Report of the Secretary-General

Addendum

III. CONTRACTING APPROACH

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A. Choice of contract structure

1. A preliminary question the parties have to address is the contract structure of the countertrade transaction. The parties may embody the obligations in regard to the shipments of goods in the two directions in one contract or they may incorporate those obligations into separate contracts.

1. Single contract

2. Under a single contract approach the parties conclude one contract for the flow of goods in the two directions. Such a single contract may take the form of a barter contract or the form of a merged contract that contains all the contractual terms governing the reciprocal shipments.

(a) Barter contract

3. As noted in chapter II, "Scope and terminology of legal guide", paragraph 10, the legal guide uses the term barter in its strict legal sense to refer to a transaction involving an exchange of goods for goods, so that the supply of goods in one direction entirely or partly replaces the monetary payment for the supply of goods in the other direction. In a barter contract there is no need for a countertrade commitment since the parties agree at the outset of the transaction on all the contract terms for the shipments in the two directions. If the goods to be supplied in one direction are agreed to be of the same value as the goods to be supplied in the other direction, no monetary payment would be made. If the values are agreed to be different, the difference may be settled by monetary payment or by further delivery of goods. The parties may or may not express the value of the goods in monetary terms. If they do so, the attachment of a price to the goods serves to compare the value of the deliveries. The parties may have to express the value of shipments in monetary terms due to customs or other administrative requirements.

4. A factor that is often the main reason for using barter is that the use of barter eliminates or reduces the need for currency transfers. It may be noted, however, that the avoidance of currency transfers may also be achieved through the use of other contractual forms, namely, the parties may conclude separate sales contracts in each direction and agree to set off their mutual payment claims (such setoff of mutual claims is discussed in chapter IX, "Payment", paragraphs ___ to ____).

5. There are several considerations that the parties may take into account in deciding whether to cast their countertrade transaction in the form

of a barter contract. One consideration is that the conclusion of a barter contract implies a comparison between the values of the goods to be exchanged, which in turn implies that the type, quality and quantity of the goods should be specified at the time of conclusion of the contract. Conclusion of a barter contract would not be feasible when the parties are not in a position to agree at the same time on the type, quality and quantity of the goods to be shipped in the two directions.

6. Another factor to be considered is the possible reluctance of a party to ship the goods before being certain that the other party will ship goods. Payment against the presentation of shipping documents or the opening of a documentary letter of credit, devices used with other types of contracts to address such a concern, cannot be used in barter since neither delivery is payable in money. Simultaneous deliveries, which might be a solution to take care of this kind of concern, are seldom feasible in international commerce. As a result, a party may delay shipping until the other party has shipped because of a concern that the other party might not ship. Such a delay may cause an inconvenience to both parties: to the party that has planned to deliver the goods at the agreed time and is burdened with the possession of the goods and to the party who does not receive the goods in time. The parties may overcome these concerns by providing for a guarantee or a stand-by letter of credit to assure the party who has shipped of compensation in the event that the other party fails to ship (the use of guarantees or stand-by letters of credit for this purpose is discussed in chapter XII, "Security for performance", paragraphs 38 and 45).

7. A further consideration is that under a barter contract the value of the goods to be shipped in one direction is often measured by the goods to be shipped in the other direction, rather than in terms of the market price for each shipment. The absence of a price in a barter contract or the use of prices that do not reflect the market prices might cause a difficulty when non-conforming goods are delivered under a barter contract. If in such a case monetary compensation is regarded as the appropriate relief, the absence in the contract of a market price, or of any price at all, could lead to disagreement over the amount of the compensation. The stipulation of a price other than the market price may also give rise to a difficulty in calculating customs duties when they are based on the market value of the goods.

(b) Merged contract

8. The term "merged contract" is used to describe the case in which the parties embody in one contract all the terms covering the obligations of the parties to ship goods to each other and to pay for the goods they have received. If the parties agree to set off their claims for payment under a merged contract, the difference between a merged contract and a barter contract, under which one shipment constitutes compensation for the other shipment, would be diminished. As in barter, there is no need in a merged contract for a countertrade commitment since the deliveries to be made in the two directions are covered by definite contract terms.

9. Many legal systems appear to give weight to the contract structure of the transaction in determining whether the obligations are interdependent. In such systems, if the mutual obligations are merged into one contract, the mutual obligations are likely to be considered as interdependent so that non-delivery, refusal to take delivery, or non-payment relating to a shipment

in one direction may be invoked as a reason for suspending or refusing performance in the other direction. Furthermore, termination of an obligation in one direction, whether or not a party is responsible for the termination, may be interpreted as entitling a party to terminate an obligation in the other direction. If the parties using a merged contract approach wish to keep the obligation to ship goods in one direction and the corresponding payment obligation independent from the obligations relating to the shipment in the other direction, they should use unambiguous language to that effect. Further discussion on the question of interdependence of obligations is found in chapter XIII.

3. Separate contracts

10. When the parties use separate contracts for the shipments in the two directions, they would use one of the following approaches: (a) the export contract and the countertrade agreement are concluded simultaneously and the counter-export contract is concluded subsequently; (b) the countertrade agreement is concluded prior to the conclusion of any definite supply contracts; and (c) the separate supply contracts for the shipment in each direction and the countertrade agreement establishing a relationship between them are concluded simultaneously.

11. The obligation to ship goods in a particular direction in a countertrade transaction may be fulfilled by two or more different contracts, which may involve different buyers and sellers. While such a situation affects the contractual structure of a given transaction, it does not affect the nature of the discussion in this chapter. Therefore, references in the singular to a supply contract, as well as to an export or counter-export contract, also cover the situation in which more than one contract is concluded for the shipment of goods in a particular direction.

(a) Export contract and countertrade agreement concluded simultaneously

12. The parties often finalize a contract for the shipment in one direction (export contract) before they are able to reach agreement on the contract for the shipment in the other direction (counter-export contract). Parties using this contracting approach may face a broad range of issues specific to countertrade. In order to assure conclusion of the counter-export contract, the parties conclude, simultaneously with the conclusion of the export contract, a countertrade agreement containing the commitment to conclude the counter-export contract. The primary purpose of the countertrade agreement in such cases is, in addition to stating the countertrade commitment, to outline the terms of the future contract and establish procedures for concluding and carrying out supply contracts. Possible issues to be addressed in such a countertrade agreement are enumerated below in paragraphs 22 to 33.

13. The contents of the countertrade agreement would be influenced by the degree to which the parties are able to define the terms of the future contract. It is advisable that the countertrade agreement be as definite as possible concerning the terms of the future contract, in particular regarding the type, quality, quantity and price of the countertrade goods, in order to increase the likelihood that the countertrade commitment will be fulfilled. To the extent that the parties are not in a position to settle the terms of

the counter-export contract in the countertrade agreement, they are advised to establish guidelines within which the terms are to be agreed upon and procedures for negotiation (for the discussion on negotiation procedures and on definiteness of the countertrade commitment see below, paragraphs 39 to 61).

14. The content of the countertrade agreement would also be influenced by the degree of interest the parties have in the shipments in the two directions. In many cases the exporter is primarily interested in the conclusion of the export contract, and the countertrade commitment results primarily from a desire to secure the export contract. In other cases, the importer purchases goods from the exporter in order to enable the exporter to finance the counter-import. In yet other cases, each side is particularly interested in obtaining the goods being offered by the other side. Because the interests of the parties vary in such a manner, the content of the countertrade agreement may vary from case to case with respect to issues such as sanctions for non-fulfilment of the countertrade commitment, payment mechanisms, procedures for concluding the future contract and for monitoring fulfilment of the countertrade commitment, and interdependence of obligations.

15. The simultaneous conclusion of an export contract and a countertrade agreement is an approach frequently used in counter-purchase, buy-back or offset transactions. In the case of the counter-purchase transaction, the parties may not yet know what type of goods would be counter-exported. In the case of a buy-back, the parties may not be able to agree on such terms as price or quantity because of the long time period between the conclusion of the contract for the export of the production facility and the beginning of production of resultant products. In an offset transaction, the parties may not know what type of goods will be counter-exported or the identity of the counter-exporters.

16. The use of this contracting approach raises the question whether to include the terms of the countertrade agreement in the export contract or to embody those terms in a separate instrument. The choice of the parties in this regard may have an effect on the degree to which the obligations stipulated in the export contract and the obligations set forth in the countertrade agreement are considered to be interdependent. When there is such interdependence, a delay in the fulfilment or non-fulfilment of the countertrade commitment may provide the importer with a justification for suspending payment of the amounts due under the export contract or for deducting corresponding damages from the payment due under the export contract. Similarly, the exporter may regard a delay in payment for the export contract as a ground for delaying fulfilment of the countertrade commitment. Furthermore, delayed payment under the counter-export contract might prompt the importer to delay payment under the export contract.

17. If the obligations relating to the export and to the countertrade commitment are embodied in separate contracts, it appears that many legal systems would consider the two sets of obligations to be independent, except to the extent specific contract provisions establish interdependence. In other legal systems the export contract and the countertrade agreement may, despite the use of separate contracts, be considered to be interdependent on the ground that the obligations of the parties embodied in the two contracts form part of a single transaction. When the parties wish to avoid

interdependence of obligations between the export contract and the countertrade agreement, or when they wish to limit interdependence to particular obligations, it is advisable that they embody the export contract and the countertrade agreement in separate contracts. When, despite the use of separate contracts, it is uncertain whether the obligations under the export contract and the countertrade agreement would be considered independent, it is advisable that the independence of the obligations be clearly expressed in the countertrade agreement.

18. The parties may wish to establish, by express contract clauses, an interrelationship between particular obligations arising out of the export contract and out of the countertrade agreement, while keeping other obligations independent. The parties may, for example, agree that refusal to take delivery under the export contract or termination of the export contract permits the exporter to terminate the countertrade agreement, and that non-fulfilment of the countertrade commitment by the counter-importer entitles the counter-exporter to deduct an agreed amount as liquidated damages or penalty from payments due under the export contract. Further discussion on the question of interdependence is found in chapter XIII.

(b) Countertrade agreement concluded prior to conclusion of definite supply contracts

19. The conclusion of a countertrade agreement may be the first step in the transaction prior to the conclusion of any definite supply contracts in either direction. The aim of the countertrade agreement in such a case is to express the commitment of the parties to conclude supply contracts in the two directions and to establish procedures for concluding and implementing those contracts. In order to achieve the envisaged level of shipments in the two directions, it is advisable that the countertrade agreement be as definite as possible concerning the terms of the contracts to be concluded in the two directions (for a discussion on negotiation procedures and on definiteness of the countertrade agreement see below, paragraphs 39 to 61). The parties may also wish to establish mechanisms for monitoring and recording the level of trade and to provide sanctions for a failure to fulfil the countertrade commitment. The need for such sanctions may be diminished if the parties agree that their countervailing claims for payment for the shipments in each direction will be set off rather than paid for individually (see chapter IX, "Payment", paragraphs ___ to___). Such a payment mechanism would provide an incentive to both parties to order goods from each other and thereby attain the level of trade envisaged in the countertrade agreement. The incentive is derived from the fact that a party who has shipped goods and holds a trade surplus will be stimulated to order goods from the other party in order to be compensated for its own deliveries. These and other issues that the parties may wish to address in a countertrade agreement entered into prior to the conclusion of any supply contract are set out below in paragraphs 22 to 33.

(c) Export contract, counter-export contract and countertrade agreement concluded simultaneously

20. When the parties simultaneously conclude a contract for the supply of goods in one direction and another contract for the supply of goods in the other direction, and there is no indication in the contracts that there is a relationship between them, the contracts would appear on their face to be independent of one another even if one party or both parties regarded the

conclusion of one contract as a condition for the conclusion of the other contract. When, however, the parties wish to give contractual effect to an intention that the conclusion of one contract be conditioned upon the conclusion of the other, i.e. when they wish to structure the contracts in the two directions as a countertrade transaction, the parties should conclude a countertrade agreement expressing that relationship.

21. This contracting approach raises a limited number of issues since it does not involve a countertrade commitment. The main issue in this contracting approach is the manner in which the obligations of the parties with respect to the shipments in the two directions are to be linked by provisions in the countertrade agreement. There is no need to deal in the countertrade agreement with various issues related to the fulfilment of the countertrade commitment (in particular the type, quality, quantity or price of the countertrade goods, time schedules of fulfilment of countertrade commitment, security of performance or liquidated damages or penalties supporting the countertrade commitment). The issues that the parties may wish to address in a countertrade agreement concluded simultaneously with the definite supply contracts in the two directions are set out below in paragraphs 34 to 36.

B. Contents of countertrade agreement

1. Countertrade agreement with countertrade commitment

22. Countertrade commitment. The essential feature of a countertrade commitment is a stipulation by which the parties undertake to negotiate in order to conclude one or more supply contracts. In order to add definiteness to the commitment and to increase the likelihood of its fulfilment, parties often include in the countertrade agreement provisions concerning terms of the anticipated contract, negotiation procedures designed to facilitate fulfilment of the countertrade commitment, sanctions for the failure to conclude the contract, and other provisions to ensure the proper carrying out of the countertrade transaction. Negotiation procedures and means for providing definiteness to the commitment are discussed in paragraphs 37 to 61. Other types of clauses that parties may wish to consider including in a countertrade agreement are enumerated below (paragraphs 23 to 33) and elaborated in the following chapters of the legal guide.

23. Type, quality and quantity of goods. In order for the countertrade commitment to be meaningful, it is particularly important that the countertrade agreement be as specific as possible as to the type, quality and quantity of the countertrade goods. Clauses in the countertrade agreement addressing these issues are discussed in chapter V.

24. Pricing of goods. Since the parties are often not in a position to set the price of the countertrade goods at the time the countertrade agreement is concluded, they may establish guidelines and procedures for setting the price at a later date. Such provisions help to prevent delays in the conclusion of supply contracts and provide pricing flexibility in long-term countertrade transactions. Issues relating to pricing clauses are addressed in chapter VI.

25. Fulfilment of countertrade commitment. A basic question to be addressed in the countertrade agreement is the length of time to be allowed for fulfilment of the countertrade commitment. In some cases, the parties establish mechanisms for monitoring and recording fulfilment of the countertrade commitment. Chapter VII discusses provisions relating both to the length of the fulfilment period and to monitoring and recording mechanisms.

26. Participation of third persons. The parties may wish to involve third persons, either as suppliers or purchasers, or both, of countertrade goods. In such cases the countertrade agreement may contain provisions concerning participation by third persons. Those provisions could determine the manner in which the third persons would be selected and the legal effect of the involvement of third persons on the obligations undertaken by the parties to the countertrade agreement. Issues to be dealt with in the countertrade agreement relating to participation of third persons are discussed in chapter VIII.

27. Payment. When payments for the shipments in each direction are kept independent, no payment issues specific to countertrade are raised. However, when the parties wish to link the payments for the shipments in the two directions so that the proceeds of the contract in one direction are used to pay for the contract in the other direction, they would have to include in the countertrade agreement provisions on the manner in which payment is to be linked. A discussion of contractual aspects of various types of linked payment mechanisms is found in chapter IX.

28. Restrictions on resale of goods. The freedom of a party to resell goods purchased in a countertrade transaction may sometimes be restricted by contractual agreement between the supplier and the purchaser of the goods. The purchaser may be restricted as to the territory of resale, as well as to the terms of resale (e.g., resale price or packaging). Clauses in the countertrade agreement concerning such restrictions are discussed in chapter X.

29. Liquidated damages and penalties. In order to limit disagreements as to the extent of damages resulting from a breach of the countertrade commitment, the countertrade agreement may stipulate a sum of money due from a party upon failure to fulfil the commitment to purchase or make available countertrade goods. The use of such clauses in a countertrade agreement is addressed in chapter XI.

30. Security for performance. The parties may use guarantees to support fulfilment of the countertrade commitment, as well as the proper performance of individual supply contracts concluded pursuant to the countertrade commitment. The use of guarantees to support the fulfilment of the countertrade commitment, or the obligation to pay under a liquidated damages or penalty clause, raises issues to be addressed in the countertrade agreement. In transactions in which the parties limit payments in cash by exchanging goods for goods or setting off countervailing payment claims, the countertrade agreement may stipulate the use of guarantees to cover liquidation of an imbalance in the flow of trade. Issues to be addressed in the countertrade agreement when the parties wish to use guarantees to support fulfilment of the countertrade commitment and liquidation of an imbalance in trade are discussed in chapter XII.

31. Interdependence of obligations. The parties may wish to address in the countertrade agreement the question of the interdependence of their obligations pertaining to the shipments in one direction with their obligations pertaining to the shipment in the other direction. This question becomes relevant when a difficulty arises in the conclusion or performance of a supply contract. Provisions of this type are examined in chapter XIII.

32. Choice of law. The parties may wish to agree upon the law to be applied to the countertrade agreement or to the supply contracts. Provisions of this nature are discussed in chapter XIV.

33. Settlement of disputes. Chapter XV examines issues to be considered in preparing dispute settlement clauses for countertrade agreements.

2. Countertrade agreement without countertrade commitment

34. When the parties simultaneously conclude separate contracts for the entire supply of goods in the two directions, there is no need for a countertrade agreement containing either a countertrade commitment to conclude future contracts, or clauses on the type, quality, quantity or price of the goods, liquidated damages or penalties to be paid for failure to conclude supply contracts, or guarantees to support the countertrade commitment.

35. The primary purpose of the countertrade agreement in this case would be to establish a link between the contracts in the two directions, namely, that the conclusion of a contract in one direction is conditioned upon the conclusion of a contract in the other direction. The countertrade agreement may provide that a problem in the performance of one contract would have an effect on the obligation to perform the contractual obligations in the other direction (clauses establishing a link of this type are discussed in chapter XIII). The parties may also establish a link between the contracts by structuring payment for the two contracts in such a way that the proceeds of the shipment in one direction would be used to pay for the shipment in the other direction. Linked payment mechanisms of this type are discussed in chapter IX.

36. In addition, the countertrade agreement may address issues such as restrictions on the resale of countertrade goods (chapter X), participation of third persons in the countertrade transaction (chapter VIII), choice of law (chapter XIV) and settlement of disputes (chapter XV).

C. Countertrade commitment

37. The degree to which the parties commit themselves to enter into a supply contract may range from a commitment to exercise "best efforts" to conclude a supply contract to a firm commitment to enter into a supply contract. Under a "best efforts" commitment, also referred to as "serious intention", the commitment of the parties is limited to negotiating in good faith, and the parties retain the discretion to refuse all contract offers that they consider unacceptable.

38. If the parties wish to increase the likelihood that a supply contract will be concluded, they should include in the countertrade agreement procedures to be followed in their negotiations (see paragraphs 39 to 42,

below) and clauses setting out, as definitely as possible, the terms of the future contract (paragraphs 43 to 61).

1. Negotiation procedures

39. Countertrade agreements may set forth with varying degrees of procedural detail the manner in which negotiations are to be carried out. Specifying the negotiation procedures increases the probability that the negotiations will lead to a successful outcome. This would be particularly true where the nature of the negotiations is likely to be complicated, either because of the subject matter of the eventual contracts or because of the number of persons who might be involved in those negotiations.

40. At a minimum, the countertrade agreement might provide that a party would be obligated to respond to contract proposals by the other party. More specific procedures would address issues such as: the party who is to submit a contract offer; questions to be covered by a contract offer; time periods for submitting it; the form, means or frequency of communication; the time period for reply; the time within which an agreement must be reached, and beyond which negotiations will be deemed to have failed. Furthermore, the parties may provide that in certain circumstances a party would be relieved of the duty to negotiate (e.g., when that party has made an offer meeting the agreed conditions and it has not been accepted, or, if the other party was to make the offer, when no such offer has been made).

41. The stipulation of negotiation procedures such as those mentioned in the previous paragraph may also increase the possibility that a party who has not negotiated in good faith could be held responsible for the failure to conclude a contract. Such procedures could enable an aggrieved party to demonstrate, for example, that the other party refused to negotiate, imposed conditions to negotiate that the party could not properly impose, used unfair dilatory tactics, reopened discussion on issues already agreed upon, negotiated with other parties when it was improper to do so, or prematurely broke off negotiations.

42. However, procedural stipulations alone do not ensure that negotiations will be successful or that a party interested in the conclusion of the contract will be able to obtain relief in the event the negotiations do not succeed. A party who refuses to enter into a contract can avoid liability by showing adherence to the negotiation procedures. The most effective way to increase the likelihood of succeeding in the negotiations and of having a basis for obtaining relief in the event the negotiations fail, would be to increase the definiteness of the countertrade commitment. This would be done by stipulating in the countertrade agreement, to the degree possible, the terms of the future contract.

2. Providing definiteness to countertrade commitment

(a) General remarks

43. Commitments to enter into supply contracts often do not stipulate in a definite manner the terms of the contracts to be concluded. Frequently the parties do not know the type of goods that will be the subject of the future supply contracts or what the terms of delivery will be. Even if the parties might be able to set out in the countertrade agreement terms of the future

supply contract, they sometimes forego doing so because they expect each party to live up to the commitment to conclude a future contract, though the terms of that contract may not be defined in great detail in the countertrade agreement.

44. A lack of definiteness may result in delays or uncertainties in negotiating a supply contract in view of the potentially broad scope of the negotiations. Furthermore, it may be difficult to establish whether a party who has refused a contract offer is in breach of the countertrade commitment.

45. Sometimes the parties are not in a position to be more definite about the terms of the anticipated supply contract than to provide that the contract terms should be fair or in accordance with the prevailing market conditions. Such provisions may be helpful when countertrade goods of a standard quality are agreed upon, thereby enabling a fair price to be ascertained. If, however, the type of countertrade goods is not settled or if the countertrade goods are products that do not have a standard price, such a "fair terms" commitment may not substantially enhance the position of the party interested in the conclusion of the contract. In such cases opinions may differ as to what contract terms are fair, thereby protracting the negotiations and making uncertain the success of a claim against the party refusing to conclude the contract.

46. Terms of a future supply contract may be specified in the countertrade agreement, or the countertrade agreement may provide guidelines for settling terms of the future contract. As the countertrade agreement becomes more definite with respect to the terms essential for the existence of an enforceable contract, the agreement approaches the point at which the parties have settled all the terms of the supply contract and postponed only the act of signing the contract.

47. Many legal systems contain rules to which the parties may resort in order to provide definiteness to a contract clause. For example, numerous legal systems provide a solution when the parties have not settled the price of the goods; the solution may be, for instance, that the price should be the one "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned" (article 55 of the United Nations Convention on Contracts for the International Sale of Goods). Another example may be the rule on the quality of the goods to be delivered under the contract when the contract has not settled that issue; the rule in article 35(2)(a) of the above-mentioned Convention is that the goods should be "fit for the purposes for which goods of the same description would ordinarily be used". In some legal systems the parties may, within certain limits, resort to a court for the purpose of determining such a contract element. In other legal systems, however, the courts are not competent to intervene in this manner in a contractual relationship.

48. Although such means for contract supplementation exist in many legal systems, they normally do not provide a solution in all cases of indefiniteness. The contract elements left indefinite in the countertrade agreement may not lend themselves to being made definite by reference to the applicable law. For example, if the parties have not agreed on the type of goods to be counter-exported, it would probably be impossible to determine the type on the basis of the applicable law. Where the type of goods has been settled, the criteria provided in the applicable law concerning the price of

the goods may not lead to a clear solution. Furthermore, such contract supplementation is subject to uncertainty arising out of divergencies among legal systems as to the techniques of supplementation, the role of the courts, the arbitral tribunal, or the parties in determining the missing term, or as to the judicial control over the result of the supplementation. In any case, reliance on such means for contract supplementation tends to be more useful for purposes of dispute resolution than it is for contract implementation. As a result, the parties may wish to consider the contractual means discussed below for providing definiteness to a contract term left open in the countertrade agreement.

(b) Contractual means of providing definiteness

49. The terms that are often left indefinite in the countertrade agreement and with respect to which contractual means for completing indefinite terms may be particularly useful are the type, quality, price and quantity of the countertrade goods. The contractual means that the parties may consider for completing any one or more of those terms are discussed in a general manner in subsections (i) through (iii) below. In other parts of the legal guide, these contractual means will be referred to in specific contexts.

(i) Standards or guidelines

50. The parties may wish to provide standards or guidelines to be used in determining particular contract terms. The use of a standard would allow the parties to determine a contract term by computation or by some other objective method not dependent upon the discretion of the parties. Examples of such standards include a formula, tariff, quotation, rate, index, statistic, or some other criterion not influenced by the will of either party. For example, the price of the countertrade goods may be determined by reference to the price at which goods of the same type are sold in a particular market or exchange, or the quality of the countertrade goods may be defined by reference to a particular national or international quality standard. Many legal systems recognize as valid a provision that the price or other contract term should be determined by reference to a standard.

51. Guidelines, on the other hand, set parameters within which a contract term is to be determined and involve a degree of latitude in arriving at a contract term. For example, the countertrade agreement may set a range within which the parties are to negotiate the price or it may be agreed that the price must be "reasonable". If the type of goods has not been determined, the parties may agree on a list of goods on which the negotiations should focus or to which it should be limited (such lists are discussed in chapter V, "Type, quality and quantity of goods"). As to other terms of the future contract, such as delivery, the parties may agree that the supply contract should be negotiated on the basis of prevailing market conditions. Where reference is made to market conditions, it is advisable that the parties refer to a specific market.

52. Because of the discretion left to the parties, the inclusion of a guideline in the countertrade agreement for a particular term in the future contract does not ensure the finalization of that term. Nevertheless, a narrow range within which agreement should have been achieved, or clear guidelines limiting the latitude available to the negotiators, will not only

make it more likely that a contract will be concluded but will also make it easier to show that a party refusing a given contract offer is in breach of the countertrade commitment.

(ii) Determination of contract term by third person

53. Sometimes the parties agree that a particular contract term will be determined by a third person. While such an approach provides a high degree of certainty that the term will be made definite, its infrequent use may be attributable to a reluctance by parties to relinquish their control over a contract term. When such a method is used, it is usually to determine the price of goods (see chapter VI, paragraphs ___to ___). The parties might be willing to agree on such a method of determining a contract term if clear guidelines are established within which the third person is to decide or if the third-person intervention is the last resort after other agreed mechanisms (e.g., negotiation, application of an agreed standard) have failed. If the parties do not wish to entrust the decision on a contract term to a third person, but still want the benefit of the opinion of a third person, it may be agreed that the determination by the third person will only be a recommendation.

54. A number of legal systems recognize the right of the parties to entrust a third person with determining a contract term. In particular, reference by the parties to a third person for the determination of the price is a question frequently addressed in legal systems. There are, however, variations among the systems. For example, while some legal systems recognize that an arbitral tribunal or even a court may be entrusted with the determination of a contract term, others permit such a determination only if it is not performed as part of arbitral or judicial proceedings. Legal systems also differ as to the consequences of a failure by the parties to agree on the third person or of a failure by the third person to act. Under some legal systems, the parties would have no recourse to a procedure for designating or replacing the person, and would have to accept the consequences of the contract term being left undetermined. In other systems, if the third person was to determine the price, the case may be treated as if the parties had agreed on a reasonable price. There are also differing approaches to the availability and extent of judicial review of a decision by a third person.

55. The issues that the parties may wish to address in a stipulation empowering a third person to determine a contract term are enumerated below.

56. Person to request determination of term. The parties may wish to address the question whether, at the time when the parties fail to agree on the term, either party would be entitled to request the third person to determine the term or whether the third person may act only upon the request of both parties.

57. The identity of the third person or the appointment procedure. The parties may wish to name in the countertrade agreement the person who is to determine the contract term. In this case, the parties may also wish to provide an appointment procedure to be used in the event that the named person fails to act or is unable to act. If the parties do not wish to name the person who is to determine the contract term, it may be advisable for the parties to agree that they will appoint the third person at such time as they are unable themselves to reach agreement on the contract term. In such a case

the parties may wish to agree on an appointment procedure, which is to become operative if the parties cannot reach agreement on the appointment of the third person.

58. Guidelines or standards to be observed by third person. The parties are advised to delimit the mandate of the third person by providing guidelines or standards to be observed in determining the contract term. Such guidelines and standards are discussed generally above, paragraphs 50 to 52, and, as to price, in chapter VI, "Pricing of goods", paragraphs ___ to ___.

59. Nature of decision of third person. The parties may agree that the decision by the third person would be binding as a contractual stipulation of the parties. Another approach may be to provide that the determination of the third person would be treated as a recommendation to be considered by the parties in good faith.

60. Procedure for challenging decision by the third person. In some situations, for example, where the binding determination by the third person involves a question of particular economic significance, the parties might wish to provide an opportunity for the decision to be challenged by resort to another person, a panel of persons, or an institution. As to the nature of the decision on the challenge, it may be provided that the decision would bind the parties or only be a recommendation. The parties may wish to stipulate the mandate that would be given to the person deciding on the challenge (i.e., to uphold or reject the challenge, or to modify the challenged decision). The parties may wish to indicate how, in the event the challenged decision is set aside, the decision on the contract term is to be made (e.g., by the parties themselves or by the same or a different third person).

(iii) Determination of contract term by contract party

61. Sometimes the countertrade agreement leaves the determination of a contract term to one of the parties to the countertrade agreement. If such an approach is contemplated, the parties should take into account the restrictions legal systems provide concerning the validity of clauses empowering a party to the contract to determine a term of the contract. Generally, an arbitrary right given to one of the parties to determine a contract term is unenforceable. If the subject of the determination is the price, a number of systems would recognize such a right given to a party if its exercise is limited by such standards as reasonableness, good faith or fairness. Some of these systems would construe ambiguous agreements as implying a reference to such a standard. Other legal systems require the freedom to determine the price to be limited by a more definite standard.

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INTERNATIONAL COUNTERTRADE

Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters*

Report of the Secretary-General

Addendum

IV. GENERAL REMARKS ON DRAFTING

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A. General remarks

1. A countertrade transaction is usually the result of extensive written and oral communications between the parties. Each party may find it desirable to establish a checklist of the necessary steps to be taken in negotiating and drawing up contracts constituting the transaction (the countertrade agreement and the supply contracts). Such a checklist could reduce the possibility of omissions or errors occurring in the steps taken prior to entering into the contract. A party may also wish to consider seeking legal or technical advice

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in drawing up the contracts. While countertrade transactions can be expected to become routine for parties experienced in countertrade, even simple countertrade transactions may pose difficulties for newcomers to countertrade calling for legal or technical advice. For complex transactions, even experienced parties may require advice.

2. The process of establishing a countertrade transaction could be facilitated if the parties agree that, before a first draft of the countertrade agreement and any supply contract is prepared, negotiations on the main technical and commercial issues are to take place. Thereafter, one of the parties could be asked to submit a first draft reflecting the agreement reached during the negotiations. A first draft may then be discussed and elaborated, resulting in a preliminary set of contract documents, which, after review and finalization, will govern the relationship between the parties.

3. The legal rules applicable to the countertrade agreement may require that a countertrade agreement be in written form. Even when written form is not required, it is advisable for the parties to express their agreement in writing to avoid later disputes as to what terms were actually agreed upon. If the parties decide that modifications of the countertrade agreement are to be in writing, it is advisable that this be stated in the countertrade agreement.

4. The parties may wish to clarify the relationship between the contract documents, on the one hand, and the oral exchanges, correspondence and draft documents which came about during the negotiations, on the other. The parties may wish to provide that those communications and draft documents are not part of the contract. They may further provide that those communications and draft documents cannot be used to interpret the contract, or, alternatively, that they may be used for this purpose to the extent permitted by the applicable law. Under the law applicable to the contract, oral exchanges and correspondence might in some cases be relevant to the interpretation of the contract even if they occur after the contract is entered into.

5. The parties should ensure that the contract terms as expressed in writing are unambiguous and will not give rise to disputes, and that the relationship between the various documents comprising the transaction is clearly established. Such precision may be of particular importance in countertrade transactions that are carried out over a long period and may have to be administered by persons who have not participated in the negotiations at the outset of the transaction (e.g. buy-back or offset transactions). Each party may find it useful to designate one person to be primarily responsible for supervising the preparation of the contract documents. It is advisable for that person to be a skilled draftsman familiar with international countertrade transactions. To the extent possible, it is advisable for that person to be present during important negotiations. Each party may find it useful to have the final contract documents scrutinized by a team having expertise in the subject-matter reflected in the documents in order to ensure accuracy and consistency of style and content.

6. The applicable legal rules may also contain rules on the interpretation of contracts and presumptions as to the meaning of certain expressions such as "reasonable price" (chapter VI, "Pricing of goods", paragraph 24), "trust" and "compte fiduciaire" (chapter IX, "Payment", paragraph 16), and "penalty" (chapter XI, "Liquidated damages and penalties",

paragraph __). The parties are advised to select contract wording in light of the applicable law in order to ensure that the expressions used reflect the intended meaning. One approach is for the applicable law to be determined at a very early stage of the relationship between the parties (e.g., at the commencement of negotiations). The countertrade transaction may then be negotiated and drawn up taking that law into account. Another approach is for the parties to determine the applicable law only after negotiations have taken place on the main technical and commercial issues and have resulted in a measure of accord between the parties. They may thereafter review the first drafts relating to the transaction, which reflect that accord, in the light of the applicable law to ensure that the terms of the draft take account of that law.

7. The parties should take into account the mandatory legal rules of an administrative, fiscal or other public nature in the country of each party that are relevant to the countertrade transaction. They should also take into account such mandatory legal rules in other countries when those rules are relevant to the transaction. Certain rules may concern the technical aspects of the countertrade agreement (e.g., safety standards for the countertrade goods or rules relating to environmental protection), and the terms of the countertrade agreement should not conflict with those rules. Other rules may concern export, import and foreign exchange restrictions (e.g., it may be provided that certain rights and obligations are not to arise until export or import licences, approvals for payments or for the use of particular payment mechanisms have been granted). Legal rules relating to taxation may be a factor, and the parties may wish to include in the countertrade agreement provisions dealing with liability for tax.

8. The parties may wish to consider whether the countertrade agreement is to contain introductory recitals. The recitals may set forth representations made by one or both parties which induced the parties to enter into the agreement. The recitals may also describe the context in which the countertrade agreement was entered into. The extent to which recitals are used in the interpretation of the terms of the agreement introduced by the recitals varies under different legal systems, and their impact on the interpretation may be uncertain. Accordingly, if the contents of recitals are intended to be significant in the interpretation or implementation of the countertrade agreement, it may be preferable to include those contents in the operative provisions of the countertrade agreement.

9. The parties may find it useful to examine standard forms of countertrade agreements, general conditions, standard clauses, or previously concluded countertrade agreements to facilitate the preparation of contract documents. Such an examination may clarify for the parties the issues that should be addressed in their negotiations. However, it is inadvisable to adopt provisions appearing in those documents without critical examination. Those provisions may, as a whole, reflect an undesirable balance of interests, or those provisions may not accurately reflect the terms agreed to by the parties. The parties may find it advisable to compare the approaches adopted in the forms, conditions or countertrade agreements examined by them with the approaches recommended in the present legal guide.

B. Language

10. The contracts constituting the countertrade transaction (i.e., the countertrade agreement and the individual supply contracts) may all be drawn up in only one language version (which may, but need not be, the language of either of the parties), or in the two languages of the parties where those languages differ, or the countertrade agreement may be drawn up in one language and the supply contracts in another language. Where the conclusion of the countertrade agreement precedes the conclusion of the supply contracts in the two directions (chapter III, "Contracting approach", paragraph 19), or where it precedes the conclusion of the counter-export contract (chapter III, paragraphs 12 to 18), it is advisable that the countertrade agreement specify the language of the contracts. The specification of the language before the commencement of negotiations on a supply contract may facilitate preparations of the parties for the negotiations and avoid a disagreement.

11. Drawing up a contract in only one language version will reduce conflicts of interpretation in regard to its provisions. Drawing up all the contracts constituting the countertrade transaction in the same language will reduce conflicts between two contracts of related content. On the other hand, each party may understand its rights and obligations more easily if one version of the contract is in its language. In addition, where extensive or complex working instructions to personnel of one or both parties are derived directly from the contract, it may be of particular importance that the contract is in the language in which the instructions are to be given. If only one language is to be used, the parties may wish to take the following factors into account in choosing that language: that it is advisable for the language chosen to be understood by the senior personnel of each party who will be implementing the contract; that it might be advisable for the contract to be in a language commonly used in international commerce; that the settlement of disputes is likely to be facilitated if the language chosen is the language in which proceedings would be conducted or if the language chosen is the language or one of the languages of the country of the applicable law.

12. If the parties do not draw up the contracts in a single language version, it is advisable to specify in the contracts which language version is to prevail in the event of a conflict between the two versions. For example, if the negotiations were conducted in one of the languages, the parties may wish to provide that the version in the language of the negotiations is to prevail. A provision that one of the language versions is to prevail might induce both parties to clarify as far as possible the prevailing language version. The parties may wish one language version to prevail in respect of certain segments of the transaction or in respect of certain contract documents (e.g. countertrade agreement or technical documents related to the countertrade agreement or a supply contract) and another language version in respect of the remainder of the contracts or documents. Where the parties provide that both language versions are to have equal status, the parties should attempt to provide guidelines for the settlement of a conflict between the two language versions. The parties may provide, for example, that the agreement is to be interpreted according to practices that the parties have established between themselves and usages regularly observed in international trade with respect to the agreement in question. The parties may also wish to provide that where a term of the contract in one language version is unclear, the corresponding term in the other language version may be used to clarify that term.

C. Parties to transaction

13. Where a contract involved in the transaction (the countertrade agreement or a supply contract) consists of several documents, the parties may wish to identify and describe themselves in a principal document designed to come first in logical sequence among the documents that incorporate that contract. The document should set forth, in a legally accurate form, the names of the parties, indicate their addresses, record the fact that the parties have entered into a contract, briefly describe the subject-matter of the contract, and be signed by the parties. It should also set forth the date on which, and the place where, the contract was signed, and the time when it is to enter into force. Subsequent reference in the contract to the parties may be facilitated if the principal document would specify that in the subsequent text and in the subordinate documents the parties would be referred to by agreed abbreviations or by expressions such as exporter, importer, counter-exporter, counter-importer, trading house. A party may have several addresses (e.g., the address of its head office, the address of a branch through which the contract was negotiated) and it may be preferable to specify in the document the address to which notifications directed to a party should be sent.

14. Parties to countertrade transactions are usually legal entities. In such cases the source of their legal status (e.g. incorporation under the laws of a particular country) may be set out in the contract. There may be limitations on the capacity of legal entities to enter into contracts. Therefore, unless satisfied of the other party's capacity to enter into the contract, each party may wish to require from the other some proof of that capacity. If a party to the contract is a legal entity, the other party may wish to satisfy itself that the official of the entity signing the contract has the authority to bind the entity. If the contract is entered into by an agent on behalf of a principal, the name, address and status of the agent and of the principal may be identified, and evidence of authority from the principal enabling the agent to enter into the contract on its behalf may be annexed.

D. Notifications

15. In a countertrade transaction a party frequently has to notify the other party of certain events or situations. Such notifications may be required, for example, to initiate negotiations for the conclusion of a supply contract, to facilitate cooperation in the performance of the contract, to enable the party to whom notification is given to take action, as the prerequisite to the exercise of a right, or as the means of exercising a right. The parties may wish to address and resolve in their contract certain issues which arise in connection with such notifications.

16. In the interests of certainty, it is desirable to require that all notifications referred to in the countertrade transaction be given in writing, although in certain cases requiring immediate action the parties may wish to provide that notification can be given orally in person or by telephone, to be followed by confirmation in writing. The parties may wish to define "writing" (see paragraph 21 below) and to specify the acceptable means of conveying written notifications (e.g., surface mail, airmail, telex, telegraph, facsimile, electronic data interchange (EDI)). However, care should be taken

not to so limit the means of notification that, if the means specified is not available, no valid notification could be given. The parties may also wish to specify the language in which notifications are to be given (e.g., the language of the contract).

17. With regard to the time when a notification is to be effective, two approaches may be considered. One approach is to provide that a notification is effective upon its dispatch by the party giving the notification, or after the lapse of a fixed period of time after the dispatch. Alternatively, the parties may provide that a notice is effective only upon delivery of the notification to the party to whom it is given (see paragraph 21 below). Under the former approach, the risk of a failure to transmit or an error by the transmitting agency in transmission of the notification rests on the party to whom the notification is sent, while under the latter approach it rests on the party dispatching the notification. The parties may find it advantageous to select a means of transmitting the notification which provides proof of the dispatch or delivery, and of the time of dispatch or delivery. Another approach may be to require the party to whom the notification is given to acknowledge receiving the notification. It may be convenient for the contract to contain a general provision to the effect that, unless otherwise specified, one or the other approach with respect to when a notification becomes effective (on dispatch or delivery) is to apply to notifications referred to in the contract. Exceptions to the general approach adopted may be appropriate for certain notifications.

18. The parties may wish to specify the legal consequences of a failure to notify. The parties may also wish to specify the consequences of a failure to respond to a notification that requires a response. For example, when the parties envisage a series of shipments, they may provide that if the supplier notifies the purchaser of a proposed shipment of a given quantity of the goods on a particular date, the purchaser is deemed to have agreed unless an objection is made.

E. Definitions

19. The parties may find it useful to define certain key expressions or concepts that are frequently used in the countertrade agreement or in the supply contract. Definitions are particularly useful in contracts between parties from different countries, even if they use the same language, because of the increased possibility that certain expressions or concepts may be used differently in the two countries. Definitions are also useful when the contracts are in two languages since they tend to reduce the likelihood of errors in translation. A definition ensures that the expression or concept defined is understood in the same sense whenever it is used in the agreement or the contract, and dispenses with the need to clarify the intended meaning of the expression or concept on each occasion that it is used. A definition is advisable if an expression which needs to be used is ambiguous. Such definitions are sometimes made subject to the qualification that the expressions defined bear the meanings assigned to them, "unless the context otherwise requires". Such a qualification takes into account the possibility that an expression which has been defined has inadvertently been used in a context in which it does not bear the meaning assigned to it in the definition. The preferable course is for the parties to scrutinize the contract carefully to ensure that the expressions defined bear the meanings assigned to them wherever they occur, thereby eliminating the need for such a qualification.

20. Since a definition is usually intended to apply throughout an agreement or contract, a list of definitions may be included in the controlling document. Where, however, an expression that needs to be defined is used only in a particular provision or a particular section of the agreement or contract, it may be more convenient to include a definition in the provision or section in question.

21. Expressions such as "countertrade agreement", "writing", "dispatch of notification", and "delivery of notification" may be defined. The parties may wish to consider the following examples:

> Countertrade agreement. "Countertrade agreement" consists of the following documents, and has that meaning in all the said documents: (a) the present document; (b) list of possible countertrade goods; (c) ... .
>
> Writing. "Writing" includes statements contained in a telex, telefax, telegram or other means of telecommunication which provides a record of the content of such statements.
>
> Dispatch of a notification. "Dispatch of a notification" by a party occurs when it is properly addressed and conveyed to the appropriate entity for transmission by a mode authorized under the contract.
>
> Delivery of a notification. "Delivery of a notification" to a party occurs when it is handed over to that party, or when it is left at an address of that party at which, under the contract, the notification may be left, irrespective of whether the notification is brought to the attention of the individual responsible to act on the notification.

22. The parties may find it useful, when formulating their own definitions, to consider the descriptions contained in the present guide of the various concepts commonly used in countertrade transactions. Those descriptions can be located by the use of the index to this guide. [Note to the Commission: it is suggested that, after the legal guide has been written, an index should be prepared.]